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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No.

LEA COUNTY ELECTRIC COOPERATIVE, INC., a corporation,
and
CENTRAL VALLEY ELECTRIC COOPERATIVE, INC., a corporation,

Petitioners,

vs.

NEW MEXICO ELECTRIC SERVICE COMPANY, a corporation, CONTINENTAL OIL COMPANY, a corporation, and PUBLIC SERVICE COMMISSION OF NEW MEXICO,

Respondents.

REVIEW ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The judgment and opinion of the Supreme Court of New Mexico, reported in 76 N. M....., 415 P. 2d 556, is printed and annexed hereto as Appendix A.

JURISDICTION

The judgment and opinion of the Supreme Court was entered on March 14, 1966 (Appendix A; R. 1435-A; 76 N.M....., 415 P. 2d 556). On July 1, 1966 the Supreme Court of New Mexico denied rehearing.[1] The jurisdiction of this Court to re-

[1] (R. 1435-M) The Supreme Court of New Mexico issued mandate on July 12, 1966. (R. 1435-N)

view by writ of certiorari a final judgment rendered by the highest court of a state "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States" is conferred by 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

The question presented is whether the decision and judgment of the Supreme Court of New Mexico in this action, and §§ 68-7-1 through 68-7-2, N.M.S.A., 1953, as interpreted therein, violate petitioners' rights under Article I, § 10 and under the 14th Amendment of the Constitution of the United States by denying due process of law and equal protection of the laws and impairing obligations of contract in that (1) petitioners' property and franchises were impaired, taken, or destroyed without just compensation and without due process of law in the guise of public regulation and (2) petitioners were invidiously discriminated against in the treatment accorded to them under the law than that accorded to respondent, New Mexico Electric Service Company.

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

§ 1 of the Fourteenth Amendment to the Constitution of the United States reads, in material part:

> "* * * No State shall make or enfofrce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, § 10 of the United States Constitution provides, in material part:

> "No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *"

The New Mexico Statutes Annotated, 1953 Compilation §§ 68-7-1 through 68-7-4, provide as follows:

"68-7-1. New construction.—No public utility shall hereafter begin the construction or operation of any public utility plant or system or of any extension thereof, without first obtaining from the commission a certificate that public convenience and necessity require or will require such construction or operation; Provided that, unless such construction or operation has been commenced under a limited or conditional certificate or authority as hereinafter provided in section [68-7-4], this section shall not be construed to require any such public utility to secure a certificate for an extension within any municipality or district within which it has heretofore lawfully commenced operations, or for an extension within or to territory already served by it, necessary in the ordinary course of its business, or for an extension into territory contiguous to that already occupied by it and not receiving similar service from another utility; but, if any public utility in constructing or extending its line, plant, or system unreasonably interferes or is about unreasonably to interfere with the service or system of any other public utility, the commission on complaint of the public utility claiming to be injuriously affected, may, after hearing, on reasonable notice, make such order and prescribe such terms and conditions in harmony with this act as are just and reasonable.

"68-7-1.1. Applications by utilities brought under Public Utility Act.—A. Within ten days after the effective date of this 1961 act, each utility brought within the jurisdiction of the public service commission for the first time by virtue of this 1961 act, shall file with the commission an application for a certificate of convenience and necessity covering its present plant, lines and system. Upon proof of present existence and operation thereof, the commission shall grant the certificate to such utility.

B. In the event the certificate granted a utility under subsection A of this section, overlaps or conflicts with a certificate heretofore issued by the commission and exercised within the time required under section 68-7-2 New Mexico Statutes Annotated, 1953 Compilation, both certificates shall be valid and both utilities shall be permitted to continue service.

"68-7-2. Authority to construct—Exercise within one year.—Unless exercised within a period designated by the commission, but not exceeding one year from the grant thereof, exclusive of any delay due to the order of any court, or failure to obtain any grant of consent, authority conferred by a certificate of convenience and necessity issued by the commission shall be null and void; but the beginning of the construction of the plant, line, system, works, or facilities of such utility, in good faith, within the time prescribed by the commission, and the prosecution of the same with reasonable diligence, shall constitute a compliance with such certifficate.

"68-7-3. Abandonment of Service regulated.—No utility shall abandon all or any portion of its service to the public except ordinary discontinuance of service for nonpayment of charges, nonuser, and similar reasons in the usual course of business, unless and until written application is first made to the commission for the issuance of a certificate that the present or future public convenience or necessity permits of such abandonment and the issuance of such a certificate. Upon the filing of such application and after public hearing of all interested parties appearing, the commission may, or may not, in its discretion, issue such certificate. The commission shall give due consideration to the relative cost and value of the service proposed to be abandoned.

"68-7-4. Certificates.—Application—Issuance. — Before any certificate may be issued under sections 68-7-1 through 68-7-4 New Mexico Statutes Annotated, 1953 Compilation, a certified copy of its articles of incorporation or charter, if the applicant is a corporation, shall be

on file in the office of the commission. Every applicant for a certificate shall give reasonable notice of its application as the commission may require and shall file in the office of the commission evidence as required by the commission to show that the applicant has received the consent and franchise from the municipality or H class county wherein construction and operation is proposed. The commission may, after hearing, issue the certificate, as prayed for, or refuse to issue the certificate, or issue it for the construction or operation of a portion only of the contemplated facility, line, plant or system, or extension thereof, or for the partial exercise only of these rights or privilege, and may attach to the exercise of the rights granted by the certificate terms and conditions in harmony with the Public Utility Act, as in its judgment the public convenience and necessity may require. If the public utility desires to exercise a right or privilege under a franchise which has not yet been granted to it, the public utility may apply to the commission for an order preliminary to the issue of the certificate. The commission may thereupon make an order declaring that it will thereafter, upon application, under rules and regulations as it may prescribe, issue the desired certificate, upon terms and conditions as it may designate, after the public utility has obtained the contemplated franchise. Upon the presentation to the commission of evidence satisfactory to it that the franchise has been secured by the public utility, the commission shall thereupon issue the certificate. Whenever a public utility is engaged or is about to engage in construction or operation without having secured a certificate of public convenience and necessity, as required by the provisions of the Public Utility Act, any interested person may file a complaint with the commission. The commission may, with or without notice, make its order requiring the public utility complained of to cease and desist from such construction or operation until the commission makes and files its decision on the complaint or until the further order of the commission. The commission may after

hearing, after reasonable notice, make the order and prescribe terms and conditions in harmony with the Public Utility Act as are just and reasonable."

The New Mexico Statutes Annotated, 1953 Compilation § 68-3-1 (B), reads as follows:

"B. It is the declared policy of the state that the public interest, the interest of consumers, and the interest of investors require the regulation and supervision of such public utilities to the end that reasonable and proper services shall be available at fair, just and reasonable rates, and to the end that capital and investment may be encouraged and attracted so as to provide for the construction, development and extension, without unnecessary duplication and economic waste, of proper plants and facilities for the rendition of service to the general public and to industry."

STATEMENT OF THE CASE

In this case an investor owned electric utility persuaded the Supreme Court of New Mexico to condone its utility piracy and the confiscation of several hundred thousands of dollars investment and future revenue of two small rural electric cooperatives, attempting to provide the first electric service to rural inhabitants of Lea County, New Mexico, with the assistance of the Federal Rural Electrification Administration (REA).

Petitioners, Lea County Electric Cooperative, Inc., hereinafter referred to as "Lea County," and Central Valley Electric Cooperative, Inc., hereinafter called "Central Valley," are rural electric cooperatives organized under the provisions of the New Mexico Rural Electric Cooperative Act (§§ 45-4-1 to 45-4-32, N.M.S.A., 1953). (R. 102, 107, 116, 123) In 1951, Lea County and, in 1950, Central Valley, in the exercise of rights granted by said Act, began constructing and extending electric facilities into the Maljamar area of Lea County, New Mexico, an oil and gas producing area which includes Township 17 South, Ranges 32 and 33 East, N.M.P.M. (R. 189, 347) Thereafter each continued to construct and extend facilities within the area,

Lea County in the easterly part and Central Valley in the westerly (R. 186, Lea County's Exhibit 3, R. Vol. 5), in order to render electric service to farmers and ranchers and a number of oil companies, including respondent, Continental Oil Company (hereinafter referred to as "Continental"). (R. 190, 350) Continental operated approximately 163 wells in the area; not all of the wells were electrified, but of those which were, 29 were supplied with electricity by Lea County and 32 by Central Valley, the latter cooperative also furnishing electric power to Continental for operation of its repressuring plant. (R. 560-61) Lea County and Central Valley furnished Continental with its requirements in their respective service areas. (R. 183) Servicing the oil industry in the Maljamar area was essential in order to extend service to and maintain and improve existing service for ranchers and farmers in this rural area of Lea County. (R. 258, 269, 271)

Following the amendment of the Public Utility Act in 1961 to recognize rural electric cooperatives as public utilities, each of the cooperatives applied to respondent, New Mexico Public Service Commission (hereinafter referred to as "Commission"), for a certificate of convenience and necessity and each was certificated as to its then existing *plant, line and system,* including those within the Maljamar area servicing Continental. (R. 188, 575, 1435-E, F) Lea County's investment within the area, underwritten by REA loans, was approximately $56,000; Central Valley's investment was substantial, also financed by the REA. (R. 191, 1126)

Throughout this period rural electric consumers in the subject area had seen neither hide nor hair of any electric service of respondent, New Mexico Electric Service Company (hereinafter referred to as "New Mexico Electric"). Earlier, in 1952, but nevertheless subsequent to the time that Lea County and Central Valley had constructed and extended facilities into the area involved, New Mexico Electric's predecessor in interest had applied for and had been issued an *area* certificate by the Commission, which included the Maljamar area. In the following year, 1953, New Mexico Electric applied for and received an *area* certificate covering the area previously cer-

tificated to its predecessor. Neither cooperative was party to either the 1952 or 1953 issuance. (R. 463, 606-34) Neither New Mexico Electric nor its predecessor, however, ever exercised the area certificate by extending facilities in respect to the area involved and in 1961 had no service close by. (R. 234, 538) As contrasted with Central Valley and Lea County—and the Federal Rural Electrification Administration—in 1961 New Mexico Electric Service, therefore, had absolutely no investment whatsoever in the area then served exclusively by Lea County and Central Valley.

In fact, during this period while Lea County and Central Valley were extending themselves (R. 189-90, 347-48), New Mexico Electric would not render service in the area, on the basis of lack of feasibility (R. 544), and the cooperatives were forced to serve or "be a party to keep people from getting electric service." (R. 279) There were entire townships within the rural portion of its certificated area not being served by New Mexico Electric, including Townships 17 South, Ranges 32 and 33 East, N.M.P.M., Lea County. (New Mexico Electric's Exhibit No. 12, R. 682 & Vol. No. 5) In 1961 the closest line of New Mexico Electric to Maljamar was approximately 14¾ miles to the southeast, consisting of 3-phase 12 KV line which was inadequate to serve a proposed load of 10,620 KW. (R. 538-39)

On or after July 1, 1961, New Mexico Electric, apparently in the belief that it was then economical to serve the rural area, accepted an agreement with Continental to supply the electric requirements of the oil company for its contemplated water flood project within the area, particularly Townships 17 South, Range 32 and 33 East. (R. 526-544, 669) Two hundred and twelve wells were included under the project, including those served by petitioners' existing facilities in the Maljamar area. (R. 560) The contract was initiated by New Mexico Electric rather than Continental. (R. 546)

Thereafter Lea County filed its complaint with the Commission alleging that New Mexico Electric unreasonably was about to interfere with its service or system by serving Continental's proposed water flood project, alleging that it was

ready, willing and able to serve the project and praying that New Mexico Electric be restrained and that it, Lea County, be granted such other relief as might be proper. (R. 102) Subsequently, Central Valley petitioned and was allowed to intervene in the proceeding on substantially the same allegations and prayer set forth by Lea County. (R. 116)

Each of the petitioners evidenced preference together to serve Continental's requirements, with each servicing those requirements in proportion to its service within the area and without wasteful duplication between systems. (R. 119, 162, 226-27, 360) Lea County and Central Valley each evidenced, however, a readiness, willingness and ability to serve Continental's entire requirements. (R. 233, 361)

Petitioners' existing systems within the area were 69 KV systems. (R. 212, 348) Continental's eventual requirement for its project will be 10,620 KW, but this peak will not be reached until some 6 or 7 years following the commencement of the project. (R. 598, 181) Petitioners individually could serve Continental's entire requirement by installing and maintaining additional facilities as the demand increased, being a total investment of $198,000 for Lea County and of $210,800 for Central Valley. (R. 230-33, 374)

New Mexico Electric had no existing facilities within the area to which it could serve all or any part of Continental's requirements. If it were to tap the nearer of Southwestern Public Service Company's 115 KV lines, New Mexico Electric, however, could serve Continental's requirements at an investment cost of between $126,000 and $135,000. (R. 439) Southwestern Public Service Company will convert (and, in fact, is in the process of converting) this line to 230 KV (R. 478), and when New Mexico Electric is then remitted to the other available of Southwestern's 115 KV lines, the investment cost to New Mexico Electric to serve Continental's requirements would be $334,400 or $279,600, the figure depending on whether its own or the cooperative's method of estimating cost is employed. (R. 1053-54)

To serve Continental's entire requirements would require Lea County to make a 18.5 mile extension of its heavier 69 KV line after the requirement passed 4,000 KW (R. 248), Central Valley a 9.5 mile extension of transmission line as the demand outgrew its present lines (R. 366) and New Mexico Electric a 3 mile extension if it taps the nearer of Southwestern's lines (R. 439) and a 15 mile extension when Southwestern Public Service Company converts its nearer line to 230 KV. Petitioners' improvement in existing facilities to serve Continental would, of course, benefit existing subscribers, whereas New Mexico Electric's entirely new extension would only serve a customer already served by petitioners. To supply Continental's requirements, Central Valley and New Mexico Electric would purchase power at wholesale from Southwestern Public Service Company, whereas Lea County already had the existing generating capacity to serve the additional load. (R. 495, 478-79, 293) The cost of service to Continental was comparable from all three sources. (R. 236, 353, 450)

The principal conflict in the evidence before the Commission related to the merits of the 69 KV system as contemplated by petitioners to serve Continental's requirements vis-a-vis a 115 KV system proposed by New Mexico Electric and whether Continental should be served at one point, allowing service by only one cooperative or New Mexico Electric, or served at two points, allowing both cooperatives to continue existing service. The Commission resolved the issues before it in favor of service to Continental by Lea County alone. In its Order the Commission restrained New Mexico Electric from entering the area to serve Continental and certificated Lea County to serve that company, concluding that New Mexico Electric's extension to serve Continental "will result in unnecessary duplication of public utility electric plant and facilities with attendant economic waste and will unreasonably interfere" with Lea County's existing system, that New Mexico Electric had failed to serve existing need for service in the subject area and its area certificate was void under § 68-7-2, N.M.S.A., 1953, as to that area and that public interest and public convenience and necessity require and will require that the service sought by Continental in Townships 17 South, Ranges 32 and 33 East,

N.M.P.M., in Lea County shall be rendered by Lea County. (R. 14-31)

A petition for judicial review was filed by New Mexico Electric in the District Court of Lea County, New Mexico, where the controversy had its origin.[2] (R. 8) Thereafter, the District Court entered its decision, concluding substantially that New Mexico Electric's 1953 certificate was valid in the Maljamar area, that New Mexico Electric was entitled to serve Continental and that the Commission was without jurisdiction to consider whether the extensions by New Mexico Electric to Continental would unreasonably interfere with the existing lines or facilities of either of the electric cooperatives. (R. 749-59) Judgment was entered annulling and vacating the Commission's order, stay pending appeal was denied and at this very moment New Mexico Electric is serving the pirated customer. (R. 763-64, 759-62, 773-74)

An appeal from the District Court to the Supreme Court of New Mexico was taken by petitioners and the Commission.[3] The Supreme Court of New Mexico sustained the judgment of the District Court of Lea County on the basis of the validity of New Mexico Electric's 1953 *area* certificate, rejecting petitioners' aforestated constitutional objections.[4] (Appendix A; R. 1435-A)

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[2] Continental filed an entry of appearance in District Court, but made no other pleading either before the District Court or the Supreme Court of New Mexico. (R. 82) Central Valley also petitioned for review on the grounds that it should have been permitted to continue its service in the westerly portion of the Maljamar field. (R. 58) Central Valley's and Lea County's basic position are not contradictory, since, as observed supra, both initially sought service only in their respective historical service areas. In the courts below and before this Court, Central Valley and Lea County have a common position against the invasion and seizure of petitioners' service in the Maljamar area by New Mexico Electric (R. 1120-1122) and assert that if both cannot be permitted to continue their historical service, one alone be permitted to serve Continental.

[3] The Commission forcefully asserted its rights before the Supreme Court of New Mexico and, after adverse judgment, joined in a futile Motion for Rehearing. (R. 1044, 1335) The Commission is nominally joined as a respondent in the instant proceeding.

[4] (R. 1317, 1330, 1374; Motion for Rehearing denied, R. 1435-M).

THERE ARE SPECIAL AND IMPORTANT REASONS FOR THE ALLOWANCE OF THE WRIT

I.

The Issue Is a Matter of Grave Concern.

Whether petitioners have been denied rights guaranteed by the Constitution of the United States presents an issue far greater than whether the cooperatives, or one of them, or New Mexico Electric should be certificated to serve Continental in the Maljamar oil and gas field. The petitioners and respondents are each representatives of two sub-classes of the electric service industry, and of the public, each of which are or should be vitally interested in the providing of reasonable and proper services in free competition at fair, just and reasonable rates through non-duplicative plants and facilities.[5]

The policies at stake in this litigation are three. All three are substantial, affecting not only the constitutional rights of

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Under the circumstances of this case, petitioners have raised federal questions in a timely fashion. No one anticipated until after the New Mexico Supreme Court had rendered its decision and opinion that it would take a position completely inconsistent with prior decisions in this area or that it would, by its decision and opinion, destroy petitioners' constitutional rights. That the federal issues were thus timely raised is true even though petitioners' motions for rehearing were summarily denied without reference to such issues. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-78 (1930); *State of Ohio v. Akron Metropolitan Park Dist.*, 281 U.S. 74, 79 (1930); *State of Missouri v. Gehner*, 281 U.S. 313, 320 (1930); *Cole v. State of Arkansas*, 333 U.S. 196, 200 (1948); *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 366-67 (1932); *Saunders v. Shaw*, 244 U.S. 317, 320 (1917).

[5] Lea County and Central Valley were joined before the Supreme Court of New Mexico by The New Mexico Rural Electric Co-op Association and twelve individual rural electric cooperatives, as amici curiae. (R. 1323-24, 1337, 1338-78, 1379-87) While New Mexico Electric is representative of the private utility sector and of those private utilities holding *area* vis-a-vis *plant, line and system* certificates held by cooperatives, Continental is representative of the consuming public who has no preference for one source over another source of adequate power (R. 849) and the Commission is representative of the public interest enunciated by § 68-3-1(B), supra, and has, at all times material hereto, been aligned against the position of New Mexico Electric.

petitioners, but the cooperative and private sector of the electric service industry in New Mexico and elsewhere, Federal and state public policy and the economic security of the Federal Rural Electrification Administration.

First, competitive free enterprise is an ideal of national and state policy. Restraints on competition must be prevented or regulated. As this Court has wisely stated, "The heart of our national economic policy long has been faith in the value of competition."[6] That policy cannot be frustrated under the guise of other regulation,[7] though, by its judgment and opinion herein, the Supreme Court of New Mexico, unless certiorari be granted, has effectively thwarted its application to the case at bar.

Second, this Court has upon past occasion upheld the importance of Federal participation in electric service, both directly and by loans. See, e.g., *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939); *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936). The Congressional purpose in favor of promoting the electrification of rural areas, as by petitioners and the other rural electric cooperatives in New Mexico, is undeniably contained in Title I of the Rural Electrification Act of 1936, which authorizes loans "for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems

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[6] *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, at 248 (1951). *Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955), p. 1, stated:

> "The general objective of the antitrust laws is promotion of competition in open markets. This policy is a primary feature of private enterprise. Most Americans have long recognized that opportunity for market access and fostering of market rivalry are basic tenents of our faith in competition as a form of economic organization."

[7] See, e.g. *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *United States v. First Nat. B. & T. Co. of Lexington*, 376 U.S. 665 (1964).

for the furnishing of electric energy to persons who are not receiving central station service."[8]

The very plant and system sought to be protected by petitioners is underwritten by loans from the Rural Electrification Administration pursuant to that Act, and the REA's substantial investment in the extensive rural electric cooperative electric systems in New Mexico, secured by the plant and facilities of petitioners and similarly situated cooperatives, is at peril in the resolvement of the substantial constitutional issue at bar.[9]

That petitioners and other rural electric cooperatives have admirably fulfilled their Federally sponsored and assisted function and have a vital role in future utility service cannot be denied.[10] Yet, the judgment and opinion of the Supreme

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[8] 7 U.S.C. § 904 and, generally, 7 U.S.C. §§ 901-14. 6 C.F.R., § 200.1 provides that REA loans, of which petitioners are recipients, "are made to finance the construction and operation of generating plants, electric transmission and distribution lines and systems to provide initial and continuing electric service to persons in rural areas. . . ." Petitioners are restricted to service in rural areas, as defined in § 45-4-32, N.M.S.A., 1953, and the stated purpose of the Rural Electric Cooperative Act, under which petitioners have been formed, is "for the purpose of supplying electric energy and promoting and extending the use thereof in rural areas." (§ 45-4-2, N.M.S.A., 1953).

[9] According to the Quarterly Statistical Summary for the Rural Electrification Program published by the Rural Electrification Administration of the United States Department of Agriculture, No. 289 (March, 1966), eighteen cooperatives organized under the New Mexico Rural Electric Cooperative Act, including petitioners, have outstanding loans from the Rural Electrification Administration in the amount of $111,480,236.00 in order to build 46,528 miles of line to serve 77,328 consumers.

[10] Hamil, "Electric Co-operatives Re-examined," 61 Public Utilities Fortnightly 289, at 290 (1958) stated:

> "Electric cooperatives have proven themselves an effective vehicle for supplying electric service in rural areas. They are an important and productive segment of the American free enterprise system. Together with the electric companies and the publicly owned electric utilities they have in the span of two decades brought the percentage of electrified farms up from 10.9 per cent to 95 per cent, and are furnishing dependable, adequate power supply to over 4 million farm homes, and other

Court of New Mexico would deny the cooperative protection against the invasion and confiscation by the investor owned utility of cooperatively developed service areas.[11] The consequence is not only the destruction of petitioners' constitutional rights and their Federally financed property, but to imperil the future development of rural areas, for the benefit of farmers and ranchers who could not otherwise receive service. (R. 258, 269, 271)

The third public policy avoided by New Mexico Electric and the Court below is the regulation of public utilities so as

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rural establishments. Many of them serve areas of our country which are the least favorably located in terms of density and economic opportunity. These offered little if anything in the way of profit to the electric companies. The unfulfilled need for electric service brought the co-operatives into being as a suitable means of satisfying that need."

"With 95 per cent of our farms electrified, there are some who say that the electrification job for which REA was established is done. Loans should taper off and co-operative expansion cease, they say. This is no more true of the electric co-operative systems than it is of the electric company system. Each has a continuing responsibility to meet all demands for service and to render dependable service in its areas." Ibid. p. 297.

[11] Moses, "Electrification and Telephone Programs," 30 Rocky Mountain Law Review 473, at 478 (1957-58) states:

"The major problem of cooperatives, now that the age of commission jurisdiction seems to be a thing of the past, is the invasion of territory by private utilities in areas adjacent to rapidly expanding cities. * * *

. . . it appears obviously unfair to allow a rural electric cooperative to invest its money to serve an area neglected by the certificated private utility and then to confiscate its assets in that area when the load becomes dense enough to be financially interesting."

In New Mexico the petitioners and other rural electric cooperatives, however, still face a problem of Commission jurisdiction as a result of a decision of the Supreme Court of New Mexico rendered one week after the decision at bar, denying the Commission jurisdiction over rural electric cooperatives. The Commission and the rural electric cooperative involved in that case have filed before this Court a Petition for Writ of Certiorari on August 29, 1966. *The New Mexico Public Service Commission, et al. v. Community Public Service Company*, October Term, 1966, Docket No. 499.

to provide for reasonable and proper electric service at fair, just and reasonable rates through proper non-duplicative plants and facilities. This is the declared policy of the State of New Mexico, as expressed in § 68-3-1 (B), quoted supra. Unnecessary duplication and economic waste between expanding systems of private and cooperative electric companies inevitably leads to higher cost to the consumer, to lower return to the investor-owner, to discouragement of future investment in expansion and in improvement of service and to the practical frustration of the Commission.

The New Mexico structure of public utility regulation, so as to avoid wasteful duplication, is as follows:

1. No public utility, whether New Mexico Electric, Lea County or Central Valley, shall begin the construction or operation of a public utility plant or system or of any extension thereof, without first obtaining from the Commission a certificate of public convenience and necessity. (§ 68-7-1, first phrase; p. 3, supra.)

2. Unless the utility begins construction under a limited or conditional certificate granted under § 68-7-4, the utility, whether private or cooperative, may without certification extend its system within any municipality or district within which it has heretofore lawfully commenced operations, or extend its system within or to territory already served by it and necessary in the ordinary course of its business, or extend its system into contiguous territory not served by another utility. (§ 68-7-1, second phrase, p. 3, supra).

3. Notwithstanding the above, if any utility in constructing or extending its system unreasonably interferes or is about to unreasonably interfere with the service of any other utility, the Commission may take action to prevent unreasonable interference, whether the complainant or respondent, one or both, be investor owned or a cooperative. (§ 68-7-1, last phrase; p. 3, supra.)

It is this last portion of § 68-7-1 under which the Commission, before arbitrary and unreasonable judicial intervention,

prevented New Mexico Electric from pirating Lea County's and Central Valley's customer, Continental, which would have otherwise resulted in the wasteful duplication of systems. The purpose of this statutory provision, and of the proceedings herein, are obvious: to avoid unnecessary duplication and economic waste, not only for the protection of the electric companies involved, but for the benefit of the respective consumers of the litigants who would bear the undue cost of duplication and interference.[12]

By its judgment and opinion herein, not only did the Supreme Court of New Mexico violate petitioners' constitutional guarantees, but the violation of petitioners' rights were also in direct contradiction to three substantial interests and policies, which, petitioners respectfully submit, are substantial issues subject to this Court's recognition and protection.

II.

Petitioners' Properties Were Taken Without Compensation and Due Process of Law and Obligation of Contract Impaired.

A. *The Decision Was Arbitrary and Unreasonable in Violation of the 14th Amendment.*

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[12] Two other statutes become involved in the controversy herein, to-wit:

1. If when the cooperatives become subject to the certification requirements in 1961, a cooperative were certificated for the same territory as that certificated by the Commission to a private utility, which certificate was exercised within the time prescribed by § 68-7-2, both utilities were entitled to continue service, so long as that service did not constitute wasteful duplication. (§ 68-7-1.1; pp. 3-4, supra).
2. A certificate of public convenience and necessity becomes null and void if not exercised within one year after issuance, unless the non-user is excused. (§ 68-7-2; p. 4, supra).

The Commission found non-user as well as unreasonable interference, but the decretal portion of its order did not forfeit New Mexico Electric's certificate, but merely enjoined New Mexico Electric, under § 68-7-1, from unreasonably interfering with Lea County's service and facilities in the Maljamar area. (R. 14-31)

The franchise section of the Public Utility Act also includes

A state may not take, destroy or confiscate private property in the guise of public regulation without just compensation or without due process of law. *Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307, 331 (1886); *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U.S. 418 (1890); *St. Louis & San Francisco R. Co. v. Gill*, 156 U.S. 649 (1895); *Smyth v. Ames*, 169 U.S. 466 (1898); *Chicago M. & St. P. R. Co. v. Wisconsin*, 238 U.S. 491 (1915); *Southwestern Bell Telephone Company v. Public Service Commission of Missouri*, 262 U.S. 276 (1923); *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 267 U.S. 552 (1925). Whenever the power of regulation is exerted in an arbitrary and unreasonable manner, it is void because repugnant to the 14th Amendment. *Atlantic Coast Line v. North Carolina Corporation Commission*, 206 U.S. 1, 20 (1907). Confiscation may result from a taking of the use of property without compensation quite as well as from the taking of title. *Chicago Rock Island & Pacific Railway Co. v. United States*, 284 U.S. 80, 96-7 (1931). It cannot be denied that petitioners' substantial investment in plant, lines and systems in excess of $100,000 in the Maljamar area (R. 191, 1126), was rendered useless for serving Continental by the judgment and opinion below. That petitioners' franchises were also impaired, taken or destroyed will be discussed, infra.

The action of the Supreme Court of New Mexico is arbitrary and unreasonable and therefore repugnant to the 14th Amendment[13] in the following respects:

1. *Petitioners Were First in the Area*: It is an elementary principle of both public utility law and constitutional law, as well as the statutory mandate of § 68-7-1, that the first or existing utility in the area is entitled to protection from a second utility taking or destroying the prior entrant's property unless the public convenience and necessity require additional service and unless the prior entrant is unable to furnish such addi-

§§ 68-7-3 and 68-7-4 concerning abandonment of service and initial certification. Neither is relevant except for purposes of statutory construction, infra, but are set out at pp. 4-6, supra.

[13] That the 14th Amendment is applicable to state action through its judiciary as well as through its legislative action, see, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948).

tional service. 3 Blackstone, Commentaries *219; *Capital Electric Power Ass'n v. Mississippi P. & L. Co.*, 240 Miss. 139, 125 So. 2d 739, 743 (1961); *Pacific Greyhound Lines v. Sun Valley Bus Lines*, 70 Ariz. 65, 216 P. 2d 404 (1950); *McFayden v. Public Utilities Consolidated Corporation*, 50 Ida. 651, 299 P. 671 (1931); *Egyptian Trans. System. v. L. & N. R. R. Co.*, 321 Ill. 580, 152 N.E. 510 (1926).

It is undisputed that petitioners began rendering service in the Maljamar area some ten to eleven years before New Mexico Electric even contracted to render service to Continental, a dozen years prior to commencement of actual service to the pirated customer when the District Court denied petitioners' request for a stay pending appeal, and one to two years before an *area* certificate was granted to New Mexico Electric or its predecessor. (R. 189-90, 183, 347, 350, 463, 606-34). Yet, the Supreme Court of New Mexico, upon the basis of its conclusion that New Mexico Electric's *area* certificate was valid and in force and effect, and without an administrative or judicial finding that public convenience and necessity required New Mexico Electric's duplicative service or petitioners could not meet Continental's increased load, denied petitioners the right to continue to serve Continental and held the Commission could not either declare the *area* certificate null or void or enjoin wasteful duplication.

And even if petitioners and New Mexico Electric were deemed on more or less equal footing from an operating viewpoint by virtue of all three having been enfranchised by public authority, it has been held that where a dispute arises between the grantees as to their rights under conflicting grants of franchise, the grantee who first enters into possession in good faith of the privileges granted has the superior right where their rights are otherwise equal. *Indianapolis St. R. Co. v. Citizens St. R. Co.*, 127 Ind., 369, 24 N. E. 1054 (1890). Again, New Mexico Electric has made and cannot make any contention that it began construction of plants, lines and system in the Maljamar area prior to either Lea County or Central Valley.

2. *New Mexico Electric's Area Certificate Was Null and Void for Non-User*: § 68-7-2 provides that unless exercised within not more than one year, exclusive of any delay due to the order of any court, or failure to obtain a municipal franchise, authority conferred by a certificate of convenience and necessity shall be null and void. It further states that the beginning of construction in good faith within that one year period, and the diligent prosecution of the same, shall constitute compliance.

The weight of authority is that a statute providing that the authority granted by a certificate of public convenience and necessity not exercised within the time required "shall be null and void" is a self-executing statute, and that this applies to partial non-exercise as well as to total non-exercise. 73 C.J.S., Public Utilities, § 42; p. 1101; *Chicago Railways Company v. Commerce Commission*, 336 Ill. 51, 167 N.E. 840 (1929); *Greyhound Corporation v. Carter*, 123 So. 2d 697 (Fla. 1960). Every grant of franchise is subject to termination for breach of condition, whether express or implied, upon which the grant depends. *Public Service Commission of Puerto Rico v. Havemeyer*, 296 U.S. 506 (1936).[14]

As shown in the Statement of the Case, supra, New Mexico Electric had no service or plant in the Maljamar area, nor even a contract to service a customer in Township 17 South, Ranges 32 and 33 East prior to mid-1961. It had refused to serve at least one customer in the area and the area since 1950 had been served by one or both of the petitioners. Its lines were some 15 miles distant from the subject area. New Mexico Electric, without excuse, utterly failed to exercise its certificate within the area from the time of its issuance in 1953.

The Supreme Court of New Mexico, however, overlooked this evidence and held, in effect, that construction of facilities within one year in one part of the certificated area will freeze in the utility as to area which it was certificated to serve, but

[14] This Court also stated that the franchise privilege may be withdrawn by declaration of executive authority, followed by judicial review, which is the case at bar. There can be no objection, therefore, to the procedure followed at bar to declare the nullity of the certificate.

failed to do so over a period of many years, and where, in default of New Mexico Electric, petitioners and the REA had invested substantial amounts to meet the public need. This, petitioners respectfully submit, violates the principle of fair play guaranteed by the 14th Amendment.

3. *New Mexico Electric's Area Certificate Was Null and Void Since at No Time Material Hereto Have the Granting of Area Certificates Been Authorized by Law*: An administrative agency or commission has only such authority and jurisdiction as is bestowed on it by the Legislature or the Constitution, as the case may be.[15] As specifically related to the issuance of certificates of convenience and necessity, the general law is stated in 73 C.J.S., Public Utilities, § 42, p. 1098:

> "A commission authorized to issue certificates of convenience and necessity has only such power in the premises as is conferred on it by statutory or constitutional provisions."

A public body in issuing a license must conform to the statute and if the agency fails in its duty, the licensee is not protected and, as with other administrative acts and rules beyond what the legislature authorized, the license is void.[16]

New Mexico Electric received its *area* certificate only under the authority of §§ 68-7-1 through 68-7-4, supra. pp. 3-6. § 68-7-1 requires a certificate before the construction or operation of *plant or system* and invests the Commission with jurisdiction to prevent unnecessary duplication between *plant, line and system* of competing utilities. The only reference to "territory" appears in the first proviso applying to extensions

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[15] *Ferguson-Steere Motor Co. v. State Corporation Commission*, 63 N.M. 137, 314 P. 2d 894 (1957); *Vermejo Club v. French*, 43 N.M. 45, 85 P. 2d 90 (1938); *Maxwell Land Grant Co. v. Jones*, 28 N.M. 427, 213 P. 1034 (1923).

[16] *Cheney v. Coughlin*, 201 Mass. 204, 87 N.E. 744 (1909); *State v. Martin*, 180 Ore. 459, 176 P. 2d 636 (1947); *Tube Bar v. Commuters Bar*, 18 N.J. Super. 351, 87 A. 2d 341 (1952); *State v. Ashby*, 73 N.M. 267, 387 P. 2d 588 (1963); *Dixon v. United States*, 381 U.S. 61 (1965); *Manhatten Gen. Equip. Co. v. CIR*, 297 U.S. 129, 134 (1936).

of service, and not to a geographical *area* in which an applicant is to be certificated.

The language of § 68-7-1 is so clear that it is not realistic to maintain that the New Mexico Legislature intended a territorial type of certificate. In event, however, that the matter remains ambiguous, it is submitted that §§ 68-7-2, 68-7-3 and 68-7-4 leave no doubt but that area certificates were not authorized by statute. § 68-7-2 provides that non-user may be avoided by diligent and good faith "construction of the *plant, line, system, works or facilities,*" and does not refer to construction within a certificated area. § 68-7-3 does not refer to area certification. § 68-7-4 makes no material mention of territory with respect to a service area to which an applicant may be certificated, but does allow the Commission to issue a partial certificate "for the construction and operation of a portion of the contemplated *facility, line, plant or system.*"

The history of the utility franchise sections and other similar laws point to the same inescapable conclusion. When §§ 68-7-1 through 68-7-4 were enacted in 1941, the same Legislature considered and enacted §§ 69-8-1 through 69-8-6, N.M. S.A., 1953, which provided for the territorial protection of telephone companies and did so by express reference to the field or territory served. The territorial nature of these laws was subject to excellent appellate review in *Mountain States Tel. & Tel. Co. v. Suburban Tel. Co.*, 72 N.M. 411, 384 P. 2d 684 (1963), app. dism. 376 U.S. 648 (1964). In contrast to the statutory language pertaining to telephone companies, no suggestion of delineation of areas or territory served is contained in the plain language used by the very same Legislature in §§ 68-7-1 et seq. relied upon by New Mexico Electric. Since language to accomplish the outlining or limiting of areas would not therefore have been difficult to devise, it cannot be said that *area* certificates were intended.[17] *In re Cox's Estate*, 57 N.M. 543, 260 P. 2d 909 (1953).

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[17] The same conclusion results from a consideration of 1965 legislation. § 69-10-1 et seq., N.M.S.A., 1953, replaced the above-mentioned telephone statutes, retaining territorial certificates and even defining the term "certificated area". (§ 69-10-2(D)). At the same time and sub-

As will be shown infra, the cannon of construction that requires a court to adopt an interpretation consistent with a statute's constitutionality mandates the conclusion that New Mexico Electric's *area* certificate is void as beyond what the Legislature authorized. In view of the fact that petitioners were denied *area* certification (*Lea County Elec. Coop. v. New Mexico Pub. Serv. Com'n.*, 75 N.M. 191, 402 P. 2d 377 (1965)), to hold that the same Public Utility Act allows New Mexico Electric, which performs a similar service to that of petitioners, to be granted an *area* certificate, would constitute invidious discrimination violative of the 14th Amendment.

That the utility franchise law under which New Mexico Electric claims an *area* certificate authorizes certificates only for *plant, line and system*, and not service *area*, is, of course, entirely consistent with the regulatory purpose. The granting of broad *area* certificates would soon cover the State of New Mexico and if the judgment and opinion below is allowed to stand that the Commission cannot prevent unreasonable interference within a certificated *area*, Commission action to prevent unnecessary duplication and economic waste would be futile. The only effective manner the Commission can carry out the policy of the Legislature as to effective public utility regulation is to authorize, as the Legislature has done, only certification covering utilities' *plant, line and system*.[18]

4. *Even if the Area Certificate Were Valid, the Commission Had Independent Power and Duty to Prevent Unreasonable Interference*: The second paragraph of the opinion of the Supreme Court of New Mexico (R. 1435-B, C; Appendix A, pp.

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sequent to this Court's action in the *Suburban Telephone* case, § 68-7-1 was amended and re-enacted without incorporating language referring to territorial certificates.

[18] That the Commission found the *area* certificate void on another ground does not detract from the persuasiveness of the above argument and authority. Under New Mexico law, a correct result will not be reversed, even though reached upon a misconception of the law. *Brundage v. K. L. House Constr. Co.*, 74 N.M. 613, 396 P. 2d 731 (1964); *Albuquerque Natl. Bank v. Johnson*, 74 N.M. 69, 390 P. 2d 657 (1964); *State Highway Com'n v. Ruidoso Telephone Co.*, 73 N.M. 487, 389 P. 2d 606 (1964); *Schmidt v. New Mexico State Tax Com'n.*, 55 N.M. 320, 232 P. 2d 986 (1951).

33-34) made it clear that petitioners asked for relief, and the Commission acted, upon the basis that the issue was whether or not, in the language of § 68-7-1, New Mexico Electric "in constructing or extending its line, plant or system unreasonably interferes or is about unreasonably to interfere with the service or system of" petitioners. This is exactly what the litigation concerned, and it is respectfully submitted that the argument and authorities engaged in by the parties and the Courts below concerning the validity or invalidity of New Mexico Electric's *area* certificate under § 68-7-2, assuming *arguendo* its validity, are irrelevant and immaterial to the basic issue of whether the Commission properly issued a cease and desist order under § 68-7-1.[19]

There is no real issue concerning the substantial nature of the evidence supporting the Commission's findings that New Mexico Electric's servicing of Continental would unreasonably interfere with existing service.[20] The only issue is whether § 68-7-1 invests the Commission with the jurisdiction and power to make just and reasonable orders concerning unreasonable interference independently of whether or not the interference resulted in area validly claimed by New Mexico Electric as within its certificated area.

In considering any provision of the Public Utility Act, it is important to consider the purpose as stated in the preamble.[21] § 68-3-1(B), quoted supra, expressly sets forth that the legislative intent and declared public policy of New Mexico is "to provide for the construction, development and extension,

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[19] The decretal portion of the Commission's order shows that the Commission took action only under § 68-7-1, and not § 68-7-2, for it did not order a forfeiture of the *area* certificate, but merely enjoined New Mexico Electric from wasteful duplication. (R. 29-31)

That under New Mexico law surplusage is to be disregarded and a correct result upheld, see the authorities cited in footnote 18, supra.

[20] The Answer Brief of New Mexico Electric did not set forth any evidence contradicting interference. (R. 1135) Evidence of interference is collected in the Brief-in-Chief of the Commission, R. 1097-1111, and in the Brief-in-Chief of Lea County, R. 1072-1077, 1027-32, 1034-36.

[21] Under New Mexico law, the preamble may be used to clarify an act and aid its interpretation. *Harriet v. Lusk*, 63 N.M. 383, 320 P. 2d 738 (1958).

without unnecessary duplication and economic waste, of proper plants and facilities" for the rendition of utility service. That purpose is a proper object of the state's police power and an implicit principle and policy of public utility regulation.[22]

§ 68-7-1, as has been observed, provided for certification prior to utility extension, except in certain limited circumstances, and continued:

> "but, if any public utility in constructing or extending its line, plant or system unreasonably interferes or is about unreasonably to interfere with the service or system or any other public utility, the commission on complaint of the public utility claiming to be injuriously affected, may, after hearing, on reasonable notice, make such order and prescribe such terms and conditions in harmony with this act as are just and reasonable."

The purpose of the quoted language, and of the proceedings below, are obvious: to avoid unnecessary duplication and economic waste for the protection of the electric companies involved and the consumer public. It is clear from the quoted language that the Commission had the power and jurisdiction to take action to prevent unreasonable interference, the fact that one or both of the utilities held *area* or other certification being immaterial.

§ 68-7-1.1 (B), set forth on pp. 3-4, supra, and providing that in event an electric cooperative's certificate overlaps or conflicts with a presently valid certificate granted prior to July 1, 1961, both certificates are valid and "both utilities shall be permitted to continue service," does not detract from the independent jurisdiction and power of the Commission to under-

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[22] That prevention of unreasonable interference, or unnecessary duplication, is a proper exercise of the state's police power, see *Idaho Power & Light Co. v. Blomquist,* 26 Ida. 22, 141 P. 1083 (1941). As stated by the Supreme Court of Arizona, ". . . it is implicit in the principle of regulated monopolies that duplication of services is prohibited." *Application of Trico Electric Cooperative, Inc.,* 92 Ariz. 373, 377 P. 2d 309, 317 (1962). 29 C.J.S., Electricity, § 13, p. 955, states: "It is the policy of the law to avoid the wasteful duplication of electric service. . . ."

take action under the quoted language of § 68-7-1. This is mandatory when the Public Utility Act is read as a whole.[23]

The Public Utility Act has expressly as one of its purposes the elimination of unreasonable interference leading to wasteful duplication. It is clear that under § 68-7-1.1 there could be several—and in this case three—public utilities with overlaps, the very situation which, but for the jurisdiction and power granted under the quoted portion of § 68-7-1, could result in the very evil the legislature sought to prohibit. The right under § 68-7-1.1 (B) of Lea County, Central Valley and New Mexico Electric "to continue service" was necessarily conditional upon the continuing jurisdiction in the Commission, under § 68-7-1, to prevent wasteful duplication in the course of such continuing service. It is no answer that, because of certification, a utility must furnish service throughout the area of its certificate, because it is the great weight of authority that a utility cannot be compelled to duplicate service except in extreme circumstances. 43 Am. Jur., Public Utilities and Services, § 24; 29 C.J.S., Electricity, § 13. To read out the independent jurisdiction of the Commission to protect against unreasonable interference when there is an overlap situation arbitrarily and capriciously ignores the express intent of the legislature, circumvents an examination of the act as a whole, giving effect to each of its parts, pleads ignorance of the professed evil which the legislature sought to avoid, disfavors public convenience, approves prejudice to the public interest, invites hardship, absurdity and injustice, and violates the 14th Amendment.

Having found, upon substantial evidence, that New Mexico Electric's extension will unreasonably interfere, and will result in unnecessary duplication, with existing line, plant and system, the Commission entered its order restraining such duplication, as was just and reasonable. It is respectfully submitted that the Commission has the express authority to hear

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[23] Under the New Mexico law, the entire act must be so considered, and the intent as deduced from the whole act will prevail over that of a separate part. *El Paso Electric Co. v. Milkman*, 66 N.M. 335, 347 P. 2d 1002 (1959).

and determine complaints of unreasonable interference as between utilities, coupled with a declared public policy against unnecessary duplication and economic waste, and that such authority was properly exercised in the case at bar, despite the erroneous resolvement of the substantial issue at bar by the Supreme Court of New Mexico.

B. *Petitioners' Franchise Rights Were Impaired, Taken or Destroyed in Violation of Art. I, § 10 and the 14th Amendment of the United States Constitution.*

Hereinabove was stated the destruction of petitioners' property rights, including their franchise rights, on account of an unreasonable, arbitrary and capricious asserted exercise of the police power. In addition, petitioners maintain that the operating rights acquired and exercised by petitioners since 1950 in the Maljamar area under the Rural Electric Cooperative Act and the certificates granted by the Commission to petitioners in 1961 pursuant to § 68-7-1.1 (A) constitute property rights and contracts within the protection of the 14th Amendment and § 10 of Article I. It is soundly held that franchise rights cannot be impaired and cannot be taken or destroyed without due process of law. *Owensboro v. Cumberland Teleph. & Teleg. Co.*, 230 U.S. 58 (1913); *Southern P. Co. v. Portland*, 227 U.S. 559 (1913); *Grand Trunk W. R. Co. v. South Bend*, 227 U.S. 544 (1913); and *Mountain States Tel. & Tel. Co. v. Town of Belen*, 56 N.M. 415, 244 P. 2d 1112 (1952).

1. *Franchise Rights under Rural Electric Cooperative Act*: As observed, the petitioners are rural electric cooperatives organized under the Rural Electric Cooperative Act (§ 45-4-1 et seq., N.M.S.A., 1953). § 45-4-3 grants the cooperatives the power to construct, maintain and operate electric transmission and distribution lines along, upon and under the across all public thoroughfares, including without limitation, all roads, highways, streets, alleys and bridges, and upon, under and across all publicly owned lands in order to distribute, sell, supply and dispense electric energy in rural areas, as is the Maljamar area which New Mexico Electric has confiscated from petitioners. (§ 45-4-31, N.M.S.A., 1953)

The term franchise means a right granted by the state to an existing corporation or individual to do things a corporation or individual otherwise could not do, such as the rights cited above. See, e.g., *Washington Water Power Co. v. Rooney*, 3 Wash. 2d 642, 101 P. 2d 580, 583 (1940); *Northeast Rapid Transit v. City of Phoenix*, 41 Ariz. 71, 15 P. 2d 951, 956 (1932); *City of Weslaco v. General Tel. Co. of S. W.*, 359 S. W. 2d 260, 262 (Tex. Civ. App. 1961). Petitioners accepted the terms of the statutory grant of franchise when they became organized under the Act and developed their respective systems within the Maljamar area, expending substantial sums of money, as aforestated.

§§ 68-7-1 through 68-7-2, as interpreted by the Supreme Court of New Mexico by its judgment and opinion herein, render petitioners' franchises in the subject Maljamar area totally useless, thereby impairing contractual obligations and destroying vested property rights without compensation and without due process of law.

2. *Franchise Rights under* § 68-7-1.1(*A*): After being granted certification by the Commission in 1961 for their plant, line and system serving Continental in the Maljamar area, petitioners continued to serve Continental on the existing system and even expended sums of money in improving the system at Continental's request. (R. 360) The Supreme Court of New Mexico correctly characterized the rights acquired under a certificate granted by the Commission as "franchise rights." (R. 1435-I; Appendix A, p. 41) Independently of characterization of petitioners' rights as "franchise rights," this Court has held that rights of the nature of those granted by the 1961 certification of petitioners are property rights entitled to constitutional protection. *Frost v. Corporation Commission*, 278 U.S. 515, 519-20 (1929). Under the judgment and opinion of the Supreme Court of New Mexico, the statutes involved have been interpreted so as to deprive petitioners without compensation or due process of law of such protected rights and to impair the obligation thereof.

III.

Petitioners Were Denied Equal Protection of the Law in Violation of the 14th Amendment.

The concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. *Reynolds v. Sims*, 377 U.S. 553, 565 (1964), reh. den., 379 U.S. 870 (1964). The 14th Amendment embodies a general policy that all persons lawfully in the United States shall abide in any state on an equality of legal privileges with all citizens under nondiscriminatory laws. *Torao Takahashi v. Fish and Game Commission*, 334 U.S. 410, 420 (1948).

State action within the 14th Amendment refers to exertions of state power in all forms and when the effect of that action is to deny rights subject to protection of the 14th Amendment, it is the obligation of the United States Supreme Court to enforce the constitutional commands. *Shelley v. Kraemer*, 334 U.S. 1 (1948). "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 37-38 (1928).

The judgment and opinion of the Supreme Court of New Mexico, and the franchise sections of the Public Utility Act as interpreted thereby, invidiously discriminate, however, against petitioners in two respects:

First, although petitioners and New Mexico Electric are performing similar services, classified as public utilities under § 68-3-2 (F) and hold certificates of public convenience and necessity, petitioners have been denied *area* certification, *Lea County Elec. Coop. v. New Mexico Pub. Serv. Com'n.*, 75 N.M. 191, 402 P. 2d 377 (1965). Petitioners must secure Commission approval and their extensions remain subject to Commission regulation under § 68-7-1. By the judgment and opinion below, New Mexico Electric, however, is not only held to have a valid existing *area* certificate, but one which protects it against Commission regulation upon extension of plant, line or sys-

tem. By having a valid area certificate freezing in the area covered thereby from Commission regulation to prevent wasteful duplication, New Mexico Electric has undeniably acquired a decided advantage vis-a-vis the petitioners.

Second, the New Mexico Supreme Court acknowledged that New Mexico Electric had not served the Maljamar area in question, whereas Lea County and Central both have (R. 1435-F; Appendix, p. 38), and, yet, concluded that New Mexico Electric should be permitted to serve Continental and that the Commission could not enter a cease and desist order under § 68-7-1. If under §§ 68-7-1 to 68-7-2 the existing plants, lines and systems of Lea County and Central Valley are to be afforded no protection against subsequent invasion of New Mexico Electric into the area, which it had not theretofore served, then petitioners are discriminated against to their material disadvantage.

There is no real basis for applying one set of rules to petitioners and a different set to New Mexico Electric in this matter. This constitutes invidious discrimination against which petitioners are constitutionally protected. *Morey v. Doud*, 354 U.S. 457 (1957); *Hartford Steam Boiler I. & Ins. Co. v. Harrison*, 301 U.S. 459 (1937); *Frost v. Corporation Commission*, supra. The statutes, as so interpreted, establish a closed class in favor of New Mexico Electric and are violative of the Equal Protection Clause, since, as so interpreted, they constitute an attempt to give an economic advantage to certain of those engaged in a given business upon an arbitrary criterion. *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266 (1936). New Mexico Electric has no right to demand action by the State which results in the denial of equal protection of the laws to petitioners. *Barrows v. Jackson*, 346 U.S. 249 (1953). The 14th Amendment prohibits prejudicial disparities before the law and under it the franchise statutes, although constitutionally unobjectionable if applied to all, are brought within the prohibition since, under the judgment and opinion of the Supreme Court of New Mexico, New Mexico Electric has more favorable treatment. *Fay v. People of State of New York*, 332 U.S. 261, 285 (1947).

CONCLUSION

In summary, the facts here are that petitioners, two small electric cooperatives, complied with the only established statutory requirements, obtained franchises and operating rights, undertook obligations to the Federal Rural Electrification Administration secured by its facilities, invested capital, constructed electric plants, lines and facilities and brought electric service to farmers, ranchers and others in the rural Maljamar area of Lea County who were never before able to get electric service. New Mexico Electric, an investor owned electric company and part of the segment of the electric service industry traditionally aligned against cooperatively supplied and Federally financed power, many years later resurrected an *area* certificate, unexercised in the Maljamar area, and initiated a contract with a prime customer of petitioners, enabling petitioners theretofore to provide rural service. After the Commission, charged with protection of the public interest, found that public convenience and necessity did not warrant New Mexico Electric's piracy and that its proposed extension into petitioners' historical service areas would cause wasteful duplication, New Mexico Electric obtained judicial review in the state courts annulling the Commission action, confiscating petitioners' property and imperiling the Federal Government's security. The state courts have accomplished this by adopting a most abnormal interpretation of the statutes involved, violating petitioners' rights under the 14th Amendment and Article I, § 10 of the United States Constitution, and in a way probably not in accord with applicable decisions of this Court and in contravention to compelling principles and policies of national and state import.

For the reasons above stated, your petitioners respectfully submit that in the exercise of this Court's sound judicial discretion, review on writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE SUPREME COURT OF NEW MEXICO
(76 N.M....., 415 P. 2d 556, March 14, 1966)

MOISE, Justice.

This is an appeal wherein Lea County Electric Cooperative, Inc., hereinafter referred to as "Lea County," Central Valley Electric Cooperative, Inc., hereinafter referred to as "Central Valley," and the Public Service Commission of New Mexico, hereinafter referred to as "Commission," are the appellants; and New Mexico Electric Service Company, hereinafter referred to as "Service Company" and Continental Oil Company, hereinafter referred to as "Continental," are the appellees. Continental has filed no brief but was present at the oral arguments.

The litigation had its inception with the filing by Lea County of a complaint with the Commission in which it was alleged that a proposed expansion by Service Company into the Maljamar area of Lea County, New Mexico, would constitute an unreasonable interference with the existing service and system of Lea County, and would amount to the pirating by Service Company of Continental, one of Lea County's customers. A restraining order was sought to prevent construction by Service Company of the proposed line. Service Company answered by alleging that it had contracted for a point of delivery to it from Southwestern Public Service Co., at a point approximately three miles from the point of delivery to Continental; that it had a certificate of public convenience and necessity to provide service in the area, had made arrangements to do so, was ready, willing and able to provide the service, and that it was in the public interest and in accord with its contractual undertakings that it provide the service. An Order to Cease and Desist and Notice of Hearing were issued by the Commission. Thereafter, Central Valley and Continental both were permitted to intervene to protect substantial rights which would be affected by the proceedings. After hearing by the Commission, it entered its opinion in which it made findings of fact and conclusions of law generally favoring Lea County and made permanent an order directing Ser-

vice Company to cease and desist from the construction of plants or facilities for the purpose of rendering electric service to Continental. A timely motion for rehearing was filed by Service Company, in accordance with § 68-8-16, N.M.S.A. 1953. It was not acted upon by the Commission within 20 days and was accordingly deemed refused (§ 68-8-16, supra). A petition for review as provided in § 68-9-1, N.M.S.A. 1953, was filed by Service Company in the district court of Lea County, New Mexico, where the controversy had its origin.

Thereafter, the district court filed its decision wherein it set forth its findings of fact and conclusions of law determining that certain findings and conclusions of the Commission, differing from those of the court, were not supported by substantial evidence and were unlawful and unreasonable and, based thereon, the order of the Commission was ordered annulled and vacated.

Although a point is made by appellant Lea County, and the Commission makes reference to the same problem, the questions concerning the proper scope of review have been decided by this court since the instant case was tried and briefed. Llano, Inc. v. Southern Union Gas Co., 75 N.M. 7, 399 P. 2d 646. Under the holding in that case the court did not err in making its own findings of fact setting forth the basis for its conclusion that the Commission's order was unlawful and unreasonable and should be annulled and vacated.

This brings us to a consideration of the court's findings which we set out in full, together with its conclusions 1 and 2, because we believe that the issues which form the basis for the court's decision are clearly apparent therefrom:

"FINDINGS OF FACT

1. Under date February 25, 1953, the Public Service Commission of New Mexico issued to New Mexico Electric Service Comppany a Certificate of Convenience and Necessity authorizing it to construct and operate a public utility system for the generation and supplying of electric power in a large area which embraces most of the south half of Lea County, and including Section 21,

Township 17 South, Range 32 East, N.M.P.M., in Lea County, New Mexico.

2. Under the undisputed evidence in the record, in the latter part of 1960 a request was made of New Mexico Electric Service Company by Continental Oil Company to provide it with public electric utility service in Section 21, Township 17 South, Range 32 East, N.M.P.M., Lea County, New Mexico.

3. Under the undisputed evidence in the record, New Mexico Electric Service Company entered into a contract with Continental Oil Company to provide it with electric service required by said company at said point. The service so to be provided was for the purpose of water flooding and use in the pumping of oil wells in the area included in Township 17 South, Ranges 32 and 33 East, all of which is within the area included in the Certificate of Convenience and Necessity issued to New Mexico Electric Service Company.

4. There is no evidence whatever in the record before the Public Service Commission of New Mexico that any demand to provide electric utility service to any person in Townships 16 and 17, Ranges 32 and 33 East has ever been made of New Mexico Electric Service Company before the request of Continental Oil Company.

5. There is no evidence in the record that New Mexico Electric Service Company has not at all times since the issuance of said Certificate provided public electric utility service to all persons within the area of the Certificate upon demand therefor.

6. New Mexico Electric Service Company, under the undisputed evidence in the record, within one year from the date of the issuance of the Certificate of Convenience and Necessity began the construction and extension of its plant, line, system, works and facilities of the utility throughout the area of its Certificate in good faith, and has prosecuted the same with reasonable

diligence from the date of the issuance of the Certificate to the date of the hearing before the Public Service Commission of New Mexico from which this appeal was taken.

7. Under the undisputed evidence in the record, upon request by Continental Oil Company for service in Section 21, Township 17 South, Range 32 East, N.M.P.M., Lea County, New Mexico, New Mexico Electric Service Company contracted to provide said service, purchased the necessary equipment therefor, and is ready, willing and able to perform the service.

8. There is no substantial evidence in the record from which the Public Service Commission of New Mexico could find that New Mexico Electric Service Company had not at all times constructed and extended the public utility system authorized in its Certificate of Convenience and Necessity within the area of the Certificate and within the area involved in this action in good faith and with reasonable diligence.

9. Under the undisputed evidence in the record there are no facilities in the area owned by any of the parties to this action which are sufficient to provide the electric utility service required by Continental Oil Company, and it will be necessary to construct the facilities necessary to provide the amount of service required by it under the undisputed evidence before the Commission.

CONCLUSIONS OF LAW

1. The Certificate of Convenience and Necessity issued to New Mexico Electric Service Company under date of February 25, 1953, is in full force and effect throughout the area of its Certificate and in Township 17 South, Ranges 32 and 33 East, N.M.P.M., Lea County, New Mexico, and under the Public Utility Act of New Mexico, said company is obligated and authorized to provide public utility service to customers desiring the same within the area of its Certificate, and any finding

or conclusion of the Public Service Commission of New Mexico to the contrary is not supported by any substantial evidence in the record, and is unlawful and unreasonable.

2. Section 21, Township 17 South, Range 32 East, N.M.P.M., Lea County, New Mexico, is in the area in which New Mexico Electric Service Company holds a Certificate of Convenience and Necessity that is in full force and effect and such company is entitled to perform its contract with Continental Oil Company, and is entitled to serve the electric utility needs of Continental Oil Company at said point and in the other portions of its certified areas in which public utility service may be demanded, in accordance with the rates of said company from time to time in effect and subject to the proper jurisdiction of the Public Service Commission of New Mexico over the rates and service regulations of electric utility companies, and any finding or conclusion of the Public Service Commission of New Mexico to the contrary is not supported by any substantial evidence in the record, and is unlawful and unreasonable."

In addition to the facts concerning Service Company's certificate, as set out in the findings above, mention should be made that Lea County is a rural electric cooperative organized in 1946 under the provisions of the New Mexico Rural Cooperative Act (§§ 45-4-1 to 45-4-32, inc., N.M.S.A. 1953), and since 1961 has held a certificate of public convenience and necessity covering its plant, lines and system issued pursuant to § 68-7-1.1, N.M.S.A. 1953. See Lea County Electric Cooperative, Inc., v. New Mexico Public Service Commission, 75 N.M. 191, 402 P. 2d 377. In 1961 when its certificate of convenience and necessity was issued it owned and operated plants and facilities for serving those desiring and needing the service in Township 17 South, Ranges 32 and 33 East, N.M.P.M. in Lea County, New Mexico. Continental obtains electricity for pumping 29 of its wells located in the area from Lea County.

Central Valley is also a rural electric cooperative organized under §§ 45-4-1 to 45-4-32, inc., N.M.S.A. 1953, and since

1961 has operated as a public utility under the regulation of the Commission as provided in § 68-7-1.1, supra. It owns and operates electric facilities in Township 17 South, Range 32 East, and furnishes electric power to Continental for pumping 32 of its wells and for operation of its repressuring plant.

In addition to the 61 wells being pumped with electric energy furnished by Lea County and Central Valley, Continental operates 102 wells within the area of the proposed water flood project which number will be increased by 49 upon completion of certain unitization programs in progress.

From all the foregoing it is unquestioned that Lea County and Central Valley both have certificates which overlap that of Service Company. It is apparent that Lea County and Central Valley both have been operating under their authority in the area in question, whereas Service Company, although authorized to do so, has not serviced the area. The Commission concluded that because of the failure of Service Company to supply the need which existed for electric service in Township 17 South, Ranges 32 and 33 East, N.M.P.M., the certificate of convenience and necessity held by it to service that area was null and void. Its conclusion No. 5 reads:

> "Although respondent had obtained a certificate of public convenience and necessity in Case No. 584 from the Commission covering the area described in Finding 4, it failed to serve the said need in any manner and therefore by reason of the provisions of Section 68-7-2, N.M.S.A. 1953, the said certificate of public convenience and necessity with respect to the said area is null and void."

The trial court, as is apparent from its findings quoted above, was of the opinion that since there was no evidence of any requests for service having been made of Service Company by anyone prior to the one made by Continental, and since Service Company had commenced construction and extension of its plant, lines and facilities within one year of the issuance of the certificate of convenience and necessity and had prosecuted the same with reasonable diligence and in good

faith, the certificate held by it was in full force and effect, and Service Company had a duty to furnish Continental with service when it was requested. It was the court's further view that the certificate of Service Company was not null and void for failure to fulfill its obligation thereunder as concluded by the Commission, and that the conclusion was accordingly unreasonable and unlawful. The court's conclusion of law No. 8 reads:

> "Conclusion No. 5 of the Commission that New Mexico Electric Service Company had failed to fulfill the obligation of the Certificate of Convenience and Necessity in Township 17 South, Ranges 32 and 33 East, N.M.P.M., Lea County, New Mexico, and that by reason thereof said Certificate was null and void, is not sustained by any substantial evidence in the record, and is unreasonable and unlawful."

To resolve the question of whether the Commission or the court correctly appraised the situation, we must examine § 68-7-2, N.M.S.A. 1953, which reads:

> "Unless exercised within a period designated by the commission, but not exceeding one [1] year from the grant thereof, exclusive of any delay due to the order of any court, or failure to obtain any grant of consent, authority conferred by a certificate of convenience and necessity issued by the commission shall be null and void; but the beginning of the construction of the plant, line, system, works, or facilities of such utility, in good faith, within the time prescribed by the commission, and the prosecution of the same with reasonable diligence, shall constitute a compliance with such certificate."

Lea County places considerable reliance on Chicago Railways Company v. Commerce Commission, 336 Ill. 51, 167 N.E. 840, and Greyhound Corporation v. Carter (Fla. 1960) 123 So. 2d 697, being cases holding certificates of convenience and necessity void upon failure to exercise them within a limited time fixed by statute. We have examined these cases and the others cited by Lea County in support of its position and conclude that because of the very material differences present

between the statutes being applied in each case from § 68-7-2, supra, they do not support the conclusion reached by the Commission.

We are impressed that the plain meaning of our statute is that construction of the plant, line, system, works or facilities necessary to perform the service covered by the certificate of convenience and necessity shall be begun not later than one year after the same is granted, or the grant becomes null and void. It certainly could not have been contemplated that no greater area could be included within a certificate than could be serviced within one year after a certificate had been granted. The only reasonable meaning of the language is that when there is a grant of a broad area certificate such as was here issued to Service Company, construction must be commenced and service made available in the area within one year, and that the construction and availability to the entire area covered by the certificate shall proceed "with reasonable diligence." So long as these requirements are met, the certificate remains in effect and does not become null and void. To hold otherwise would mean, in effect, that an area certificate such as was granted to Service Company was in fact only good as to that portion of the area wherein service was made available within one year, and that thereafter additional authority would be required to bring service to each portion of the area sought to be served, notwithstanding it was included within the area originally covered by the certificate, and notwithstanding the fact that prosecution of construction of the plant, line, system, works, or facilities had proceeded with reasonable diligence. As a matter of fact, it would seem that the Commission is attempting to do in this proceeding that which it could have done in originally issuing the area certificate to Service Company, i.e., granting a partial certificate or attaching terms and conditions as authorized by § 68-7-4, N.M.S.A. 1953. Compare Application of Trico Electric Cooperative, Inc., 92 Ariz. 373, 377 P. 2d 309; Paradise v. Pennsylvania Public Utility Commission, 184 Pa. Super. 8, 132 A. 2d 754.

The record discloses that the Commission made no determination of whether Service Company, after commencing con-

struction within one year after its certificate was granted, thereafter prosecuted the same with diligence. A finding based on substantial evidence that it had not done so was an absolute requirement before there could be a determination that its certificate was null and void. Compare State v. Washington Public Service Commission, 35 Wash. 2d 858, 216 P. 2d 177. Until we are presented with the question we do not determine what is or is not diligence in any given situation. Neither could the Commission deny to Service Company its right to continue in the area covered by its certificate if its certificate had been exercised as required by § 68-7-2, supra, or, in other words, if its certificate was valid in the area sought to be served by it, even though other public utilities had overlapping or conflicting certificates. § 68-7-1.1 (B), N.M.S.A. 1953.

At this point we take note of § 68-7-1, N.M.S.A. 1953. As we view this section, it prohibits construction of any facilities for public utility service without first obtaining a certificate of convenience and necessity, and provides that the holder of a certificate need not get a permit for extensions within a district where it has lawfully commenced operations, or to territory being served by it and necessary in the ordinary course of its business. Compare State v. Public Service Commission of Missouri (Mo. App. 1960) 343 S.W. 2d 177.

As we read § 68-7-1, supra, its only possible application under the facts here present would arise from the language which states that, "if any public utility in constructing or extending its lines, plant, or system unreasonably interferes or is about unreasonably to interfere with the service or system of any other public utility, the commission on complaint of the public utility claiming to be injuriously affected may, after hearing, on reasonable notice, make such order and prescribe such terms and conditions in harmony with this act as are just and reasonable." Assuming the applicability of the quoted language, and Service Company seems to proceed on the theory that it is applicable, it is nevertheless apparent that thereunder the Commission could not hold existing franchise rights null and void, nor could it make an order which would conflict with § 68-7-1.1, supra, which states that when certificates granted utilities under that section overlap, certificates there-

tofore issued "and exercised within the time required under section 68-7-2, New Mexico Statutes Annotated, 1953, Compilation, both utilities shall be permitted to continue service." Both of these things it undertook to do and, as held by the trial court, erred therein. What kind of an order could legally be made, or what kind of terms and conditions could legally be imposed under § 68-7-1, supra, we do not consider. It is sufficient for our purposes that the order made was erroneous because the Commission mistakenly considered that Service Company's franchise was automatically null and void as to any part of the area not served within one year.

The problem has arisen because of the conflict between the area certificate held by Service Company and the certificate covering present plant, lines and systems which Lea County and Central Valley obtained under § 68-7-1.1, supra. However, the same section provides that in this circumstance "both certificates shall be valid and both utilities shall be permitted to continue service." It follows that if Service Company's certificate is still valid and in effect, it would be entitled to serve along with Lea County and Central Valley. Compare Central Kansas Electric Cooperative Ass'n v. State Corporation Commission, 165 Kan. 471, 196 P. 2d 212.

We are unable to follow the Commission's argument that since § 68-7-1, supra, allows the Commission to make orders therein provided for, subject to terms and conditions in harmony with the act, and since § 68-7-2, supra, is part of the act and states the circumstances under which a certificate becomes "null and void," the Commission had power to cancel the Service Company certificate in this proceeding. Aside from the fact that we do not grasp the logic of the argument, as already noted above we do not consider that § 68-7-1, supra, under the facts here present, is to be applied as attempted by the Commission.

If the Commission has power to revoke a certificate, and for the purposes of this case we assume that it does, it would be our view that the authority as well as the procedure therefor would be found in §§ 68-8-1 to 68-8-16, inc., N.M.S.A. 1953, rather than in §§ 68-7-1 and 68-7-2, supra, as contended by the

Commission. Neither the complaint in the instant case, nor the procedure followed, was sufficient to accomplish a cancellation of any authority held by any of the utilities here involved.

We assume, but do not decide, that a conclusion that the certificate of Service Company was null and void, if based upon proper findings, could probably be made in determining the issues in a hearing under § 68-7-1, supra, as a necessary incident of the larger questions presented thereunder, but even so, it would have to be based on ultimate findings of fact having substantial support in the evidence. Compare Templeton v. Pecos Valley Artesian Conservancy District, 65 N.M. 59, 332 P. 2d 465.

In this connection, the denial to Central Valley of its right to continue to serve Continental along Central Valley's plant, lines and system for which it holds a certificate of convenience and necessity was equally a denial of rights and could not be accomplished without proper findings. It would seem that under § 68-7-1.1, supra, Central Valley is entitled to continue service on its existing plant, lines and system, along with Service Company, if its area certificate is valid, at least so long as terms and conditions therein under § 68-7-1, supra, have not been legally imposed.

In view of our conclusions as above set forth, we do not consider it necessary for us to pass upon the other arguments advanced by the appellants. They all proceed on an assumption here held to be lacking in support, that Service Company's franchise was null and void, or could be cancelled in this proceeding or made subject to orders restricting or denying the right to furnish service thereunder. Having decided otherwise, the various points argued by Lea County and the Commission, and adopted by Central Valley, are deprived of their persuasiveness.

Because of the form of our statute (§ 68-9-5, N.M.S.A. 1953) we are limited in our disposition of the cause to affirming or reversing the lower court, and the cause cannot be remanded to permit the Commission to supply necessary findings as was

done in Paradise v. Pennsylvania Public Utility Commission, supra, and State v. Washington Public Service Commission, supra. See Transcontinental Bus System v. State Corporation Commission, 56 N.M. 158, 241 P. 2d 829, and State v. Carmody, 53 N.M. 367, 208 P. 2d 1073.

It follows from what has been said that the judgment of the district court vacating and annulling the order of the Commission was correct and should be affirmed.

IT IS SO ORDERED.

CARMODY, C. J., and CHAVEZ, J., Concur.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 599

LEA COUNTY ELECTRIC COOPERATIVE, INC., a corporation,

and

CENTRAL VALLEY ELECTRIC COOPERATIVE, INC., a corporation, *Petitioners,*

v.

NEW MEXICO ELECTRIC SERVICE COMPANY, a corporation, CONTINENTAL OIL COMPANY, a corporation, and PUBLIC SERVICE COMMISSION OF NEW MEXICO, *Respondents.*

On Petition for Writ of Certiorari to the Supreme Court of New Mexico

BRIEF FOR RESPONDENT NEW MEXICO ELECTRIC SERVICE COMPANY IN OPPOSITION

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CENTRAL VALLEY ELECTRIC COOPERATIVE, INC., a corporation, *Petitioners,*

v.

NEW MEXICO ELECTRIC SERVICE COMPANY, a corporation, CONTINENTAL OIL COMPANY, a corporation, and PUBLIC SERVICE COMMISSION OF NEW MEXICO, *Respondents.*

On Petition for Writ of Certiorari to the Supreme Court of New Mexico

BRIEF FOR RESPONDENT NEW MEXICO ELECTRIC SERVICE COMPANY IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of New Mexico was filed March 14, 1966, Appendix A; R. 1435-A, and is reported at 415 P. 2d 556. It will be included

in Volume 76 N.M. when published. It is attached to the Petition for Writ of Certiorari as Appendix A, p. 33. Motion for rehearing was denied without opinion on July 1, 1966 (R. 1435-M).

JURISDICTION

There is no jurisdiction to review the decision of the Supreme Court of New Mexico for the following reasons:

1. The constitutional questions raised by the Petition for Writ of Certiorari were first presented to the Supreme Court of New Mexico by Motion for Rehearing after the opinion had been written (R. 1317, 1330, 1374). The Motion for Rehearing was denied without opinion (R. 1435-M), and the opinion of the Supreme Court was based upon the same construction and application of New Mexico law as the opinion of the District Court (R. 749-759).

2. The issues involved are local in nature, applicable only in the State of New Mexico, and the Judgment rests upon an adequate non-federal basis.

QUESTION PRESENTED

Whether or not the decision of the Supreme Court of New Mexico violated Petitioners' rights under the Constitution of the United States by impairing the obligations of contract under the provisions of Article I, Section 10 of the Constitution of the United States, or deprived Petitioners of property and of equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT

It is deemed necessary to correct substantial inaccuracies in the statements contained in the Petition for Writ of Certiorari.

The record does not disclose that the Supreme Court of New Mexico "was persuaded" to "condone" any "piracy." The Findings of Fact of the trial court are set out in Appendix A to the Petition for Writ of Certiorari, beginning at Page 34. Those findings were held by the Supreme Court of New Mexico to have been properly made under the testimony in this case. The decision here as in the Supreme Court of New Mexico must rest upon these ultimate findings. The findings are as follows:

"FINDINGS OF FACT

1. Under date February 25, 1953, the Public Service Commission of New Mexico issued to New Mexico Electric Service Company a Certificate of Convenience and Necessity authorizing it to construct and operate a public utility system for the generation and supplying of electric power in a large area which embraces most of the south half of Lea County, and including Section 21, Township 17 South, Range 32 East, N.M.P.M., in Lea County, New Mexico.

2. Under the undisputed evidence in the record, in the latter part of 1960 a request was made of New Mexico Electric Service Company by Continental Oil Company to provide it with public electric utility service in Section 21, Township 17 South, Range 32 East, N.M.P.M., Lea County, New Mexico.

3. Under the undisputed evidence in the record, New Mexico Electric Service Company entered into a

contract with Continental Oil Company to provide it with electric service required by said company at said point. The service so to be provided was for the purpose of water flooding and use in the pumping of oil wells in the area included in Township 17 South, Ranges 32 and 33 East, all of which is within the area included in the Certificate of Convenience and Necessity issued to New Mexico Electric Service Company.

4. There is no evidence whatever in the record before the Public Service Commission of New Mexico that any demand to provide electric utility service to any person in Townships 16 and 17, Ranges 32 and 33 East has ever been made of New Mexico Electric Service Company before the request of Continental Oil Company.

5. There is no evidence in the record that New Mexico Electric Service Company has not at all times since the issuance of said Certificate provided public electric utility service to all persons within the area of the Certificate upon demand therefor.

6. New Mexico Electric Service Company, under the undisputed evidence in the record, within one year from the date of the issuance of the Certificate of Convenience and Necessity began the construction and extension of its plant, line, system, works and facilities of the utility throughout the area of its Certificate in good faith, and has prosecuted the same with reasonable diligence from the date of the issuance of the Certificate to the date of the hearing before the Public Service Commission of New Mexico from which this appeal was taken.

7. Under the undisputed evidence in the record, upon request by Continental Oil Company for service in Section 21, Township 17 South, Range 32 East, N.M.P.M., Lea County, New Mexico, New Mexico Electric Service Company contracted to provide said service, purchased the necessary equipment

therefor, and is ready, willing and able to perform the service.

8. There is no substantial evidence in the record from which the Public Service Commission of New Mexico could find that New Mexico Electric Service Company had not at all times constructed and extended the public utility system authorized in its Certificate of Convenience and Necessity within the area of the Certificate and within the area involved in this action in good faith and with reasonable diligence.

9. Under the undisputed evidence in the record there are no facilities in the area owned by any of the parties to this action which are sufficient to provide the electric utility service required by Continental Oil Company, and it will be necessary to construct the facilities necessary to provide the amount of service required by it under the undisputed evidence before the Commission."

Among other assertions contained in the Petition for Writ of Certiorari the assertions that New Mexico Electric Service Company had failed to comply with the provisions of its Certificate of Convenience and Necessity; that New Mexico Electric Service Company would not render service in the area of its certificate; that New Mexico Electric Service Company did not exercise its Certificate of Convenience and Necessity; and that the decision in the case results in the confiscation of Petitioners' property are either not supported by any evidence in the case or are contrary to the undisputed evidence in the case.

ARGUMENT

I.

Certiorari Will Not Issue to Review a Decision of a State Court of Last Resort on Constitutional Issues Presented for the First Time on Motion for Rehearing.

An unbroken line of decisions of this Court hold that certiorari will not issue to review a decision of the court of last resort of a state upon Federal constitutional questions that were not presented to the state court until motion for rehearing after final opinion. Typical of these cases is the case of *American Surety Company* v. *Baldwin,* 287 U.S. 156, 53 S. Ct. 98, 77 L. Ed. 231, 86 A.L.R. 298. The Court there said:

> "The Surety Company petitioned for a rehearing. In that petition, besides reiterating several of its previous contentions, it urged, for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The petition was denied without opinion. The federal claim there made cannot serve as the basis for review by this Court. The contention that a federal right had been violated rests on the action of the trial court in entering judgment without giving notice and an opportunity to be heard. The same ground of objection had been raised throughout the proceedings but solely as a matter of state law. There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment. Compare Corkran Oil & Development Co. v. Arnaudet, 199 U.S. 182, 193, 50 L. ed. 143, 149, 26 S. Ct. 41; Godchaux Co. v. Estopinal, 251 U.S. 179, 181, 64 L. ed. 213, 214, 40 S. Ct. 116; Live Oak Water Users' Asso. v. Railroad Commission, 269 U.S. 354, 357, 70 L. ed. 305, 308, 46 S. Ct. 149. This is not a case where, as in Saunders v. Shaw. 244 U.S. 317, 320, 61 L. ed. 1163, 1165, 37

S. Ct. 638, the federal claim arose from the unanticipated disposition of the case at the close of the proceedings in the state Supreme Court. Compare Ohio ex rel, Bryant v. Akron Metropolitan Park Dist. 281 U.S. 74, 79, 74 L. ed. 710, 715, 66 A.L.R. 1460, 50 S. Ct. 228. Nor is the federal claim based, as in Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 678, 74 L. ed. 1107, 1112, 50 S. Ct. 451, upon the unanticipated act of the state Supreme Court in giving to a statute a new construction which threatened rights under the Constitution. Compare Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U.S. 313, 320, 74 L. ed. 870, 875, 50 S. Ct. 326."

The case at bar does not come within any of the exceptions to the settled rule. The Supreme Court of New Mexico denied the Motion for Rehearing which first raised the federal constitutional questions without opinion. The decision of the District Court and the decision of the Supreme Court were based upon the same construction and application of New Mexico law. If a federal constitutional question was to be relied upon, it should have been presented to the trial court, and in any event to the Supreme Court of New Mexico upon the appeal and not for the first time upon Motion for Rehearing. There was nothing in the decision of the Supreme Court of New Mexico that could in any manner be said to have produced an unanticipated result.

II

The Issues Involved Are Local in Nature, Applicable Only in the State of New Mexico, and the Judgment Rests Upon an Adequate Non-federal Basis.

An examination of the proceeding will reveal that the issues involved were resolved by the construction of New Mexico law applicable only in the State of New Mexico. The Motion for Rehearing asserts the unconstitutional application of the opinion based both upon the state and federal constitutions. The Motion for Rehearing was denied without opinion and aside from the entirely local nature of the controversy, there is adequate non-federal basis for the action below. *Jankovich* v. *Indiana Toll Road Commissioners,* 379 U.S. 487, 13 L. Ed. 2d 439, 85 S. Ct. 493.

III

The Reasons Advanced by Petitioners for the Allowance of the Writ Do Not Disclose an Issue That Has Importance Outside of the Particular Case and the State of New Mexico.

Petitioners assert three reasons claimed to justify the issuance of the writ. The fact, if it be a fact, Petitioners are financed by the Federal Rural Electrification Administration can have no possible significance in a determination of the rights of the parties to this action. The case certainly does not affect in any manner the ideal of competitive free enterprise. The only issue involved is whether or not a particular customer will obtain electric service from an investor owned public utility operating within its certified area, or one or more electrical co-ops who are limited by charter provisions from serving the entire public.

The second reason advanced certainly fails to convince. There is no way in which a decision in this case

can affect the development of electric cooperatives operating under the New Mexico Rural Electrification Act from performing their intended objective of rural service. The eulogy to the accomplishments of rural electric cooperatives and the fact they are financed by the Federal Rural Electrification Administration cannot affect the right of New Mexico Electric Service Company to render electric utility service in its certified area. The statement that property rights belonging to Petitioners are destroyed is eliminated by the undisputed evidence showing by Finding 9, *supra,* to the effect that regardless of who furnishes the Continental requirements, complete new facilities must be constructed to provide the service.

The third reason advanced relates to the public policy of New Mexico. Petitioners attempt to state the public policy of New Mexico contrary to the decision of the Supreme Court of New Mexico and contrary to the action of the New Mexico Legislature who limited rural electric cooperatives in New Mexico from serving the general public by putting a 10% limitation in the charter of such organizations. *New Mexico Rural Electrification Act,* 45-4-1 *Et Sequa,* N.M.S.A., 1953; *Socorro Electric Cooperative, Inc.* v. *Public Service Company,* 66 N.M. 343, 348 P. 2d 88. The provisions of the New Mexico Public Utility Act prohibiting the extension of public utility facilities so as to interfere with the service of other utilities have been a part of the New Mexico Utility Act since its adoption in 1941. They are not applicable in the case at bar. The District Court and the Supreme Court of New Mexico in the construction and application of these New Mexico statutes simply held that a certified public utility could extend its service within its certified area. This decision does not affect the right of Petitioners to extend

their lines as provided by the Certificate of Convenience and Necessity issued to them under their "grandfather rights" and that right together with the right of New Mexico Electric Service Company co-exist at the point of service in this case.

IV

No Property of Petitioners Has Been Taken Without Due Process, Without Compensation, or in Impairment of Contractual Obligations.

A. As has been stated, the plant of Petitioners heretofore used to provide electric service to the Continental wells must be retired regardless of who provides the service here at issue. Continental will receive service at a central point and will distribute electric energy from that point over its own distribution lines to the wells being served in the water flood project. Facilities of Petitioners heretofore used to pump these wells must be retired in any event and new facilities are required for the purpose of making the deliveries to Continental at the central point of delivery.

1. When Petitioners first began rural electric service in the general area of the Continental service, they were not public utilities and are not now public utilities. They extended their lines under the provisions of the New Mexico Rural Electrification Act without regard to the service area of investor owned utilities. The service here involved is a new service requiring new facilities. The statute which purported to make Petitioners public utilities clearly provided that it would not affect the Certificates of Convenience and Necessity theretofore issued to investor owned utilities, but provided that in the event of an overlap in electric service in any area, both the investor owned

utility and the rural electric cooperative could provide service.

2. It is asserted that New Mexico Electric Service Company's area Certificate was null and void for non-user. This assertion was completely rejected by the New Mexico Supreme Court in the case at bar and by the District Court based upon the record made before the Public Service Commission of New Mexico. The New Mexico Act in respect to Certificates of Convenience and Necessity is not self-executing and an area certificate is valid so long as the public utility holding such certificate continues to extend public utility service in the area of the certificate in good faith and with reasonable diligence. The trial court found in Finding No. 8 that there was no evidence from which it could be found New Mexico Electric Service Company had not at all times constructed and extended its public utility system throughout the area of its Certificate in good faith and with reasonable diligence and under Finding No. 5 that the New Mexico Electric Service Company had at all times provided electric utility service to any person in the area of its Certificate upon demand therefor.

3. It is asserted that under New Mexico law the granting of an area certificate is not authorized by law. The record shows that it has been the consistent practice of the Public Service Commission of New Mexico for many years to grant area certificates and the practice has been approved by the Supreme Court of New Mexico not only in the case at bar, but in the case of *Edington v. New Mexico Public Service Commission,* 74 N.M. 647, 397 P. 2d 300. In this case after the adoption of the 1961 Act an area certificate was granted to a rural electric cooperative in an area

theretofore served by an investor owned utility, and this action was affirmed by the Supreme Court. The application of Lea County Electric Co-op involved in the case of *Lea County Electric Co-op* v. *New Mexico Public Service Commission*, 75 N.M. 191, 402 P. 2d 377, did not hold that an area certificate could not be granted under New Mexico law. It simply held that under the requirements of the 1961 amendment, the Public Utility Act, a rural electric co-op was entitled to a Certificate of Convenience and Necessity for its existing plant, lines and facilities. The record shows in the case here that the Public Service Commission in the granting of the certificate there involved also granted to the co-op the right to extend its service to adjacent territory and customers. They held that the Commission was not required in a case in which application had been made for "grandfather rights" under the 1961 Act to define the area of conflict between the cooperative and the investor owned utility holding a certificate in the area.

4. The assertion that the Public Service Commission of New Mexico had the independent power and duty to prevent unreasonable interference with the plant, lines and facilities of other public utilities would not be applicable at this time in light of the holding of the Supreme Court of New Mexico in *Community Public Service Company* v. *New Mexico Public Service Commission*, 414 P. 2d 675, 76 N.M. ——, that Petitioners were not public utilities. Aside from this holding, the construction of the New Mexico statute by the Supreme Court of New Mexico in this particular affords no basis for federal intervention. The point is an attack upon the correctness of the New Mexico Supreme Court opinion and the opinion of the District Court on a con-

struction of a New Mexico statute under the facts found by the trial court from the record made in this case. Certainly such a point is not a ground for the issuance of a writ of certiorari by the United States Supreme Court to review a decision of a state court of last resort limited to a proper construction of state statutes.

B. Petitioners assert their franchise rights were impaired in violation of Article II, Section 10 of the Constitution of the United States and the Fourteenth Amendment thereto. The franchise rights to which reference is made are those rights granted under the New Mexico Electric Cooperative Act (45-4-1, et sequa, N.M.S.A., 1953), yet the same Act prohibits such a corporation from servicing the general public and permits it only to serve non-members to the extent of 10% of its membership. The terms of this franchise were accepted by Petitioners. They have operated under the terms of this franchise, and certainly cannot object to the limitations thereby imposed upon them.

Nothing prevents the exercise by the Petitioners in this case of the rights granted to them under their Certificate of Convenience and Necessity as that service cannot be had upon the existing lines of the company due to the nature of the service and not to the opinion of the Supreme Court of the State of New Mexico.

V

Petitioners Were Not Denied the Equal Protection of the Law in Violation of the Fourteenth Amendment.

Petitioners and New Mexico Electric Service Company are not on an equal status by reason of the inability of Petitioners under the provisions of their charter to serve the general public. They are not re-

quired to secure Commission approval for the extension of their lines to adjacent territory and have lost no right which was possessed by them. The Supreme Court of New Mexico and the District Court that tried this case only held that New Mexico Electric Service Company as the certified public utility in the area had the right to enter into contracts to provide public utility service in its certified area and that that right could not be destroyed as long as that company exercised that Certificate of Convenience and Necessity with due and reasonable diligence as required by New Mexico law.

The case simply does not apply one set of rules to Petitioners and a different set to New Mexico Electric Service Company. The Judgment of the District Court and of the Supreme Court recognize that both Petitioners and New Mexico Electric Service Company have the right to serve in accordance with the provisions of their Certificate of Convenience and Necessity.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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Brief for Respondent in Opposition, *The New Mexico Public Service Commission, et al v. Community Public Service Company*, October Term, 1966, No. 499, page 11, footnote 11 4

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 599

LEA COUNTY ELECTRIC COOPERATIVE, INC., a corporation,
and
CENTRAL VALLEY ELECTRIC COOPERATIVE, INC., a corporation,
Petitioners.

vs.

NEW MEXICO ELECTRIC SERVICE COMPANY, a corporation, CONTINENTAL OIL COMPANY, a corporation, and PUBLIC SERVICE COMMISSION OF NEW MEXICO,
Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

BRIEF FOR PETITIONERS IN REPLY TO BRIEF FOR RESPONDENT NEW MEXICO ELECTRIC SERVICE COMPANY IN OPPOSITION

OPINION BELOW

See Petition, page 1.

JURISDICTION

See Petition, pages 1-2.

QUESTION PRESENTED

See Petition, page 2.

STATEMENT

Respondent New Mexico Electric sets forth in its Statement alleged corrections to Petitioners' Statement found on pages 6-11 of their Petition. New Mexico Electric neither

quotes from the record nor makes any specific references to the record in support of its assertions, and such alleged corrections may be disregarded. In contrast, Petitioners set forth facts, supported by specific record references, establishing the denial of a federal right, which New Mexico Electric has not effectively refuted in its Brief in Opposition.

New Mexico Electric does, however, set forth certain findings of fact made by the trial court and repeated by the Supreme Court of New Mexico, accompanied by the bland statement that "The decision here as in the Supreme Court of New Mexico must rest upon these ultimate findings." Brief in Opposition, page 3.[1] No authority is cited for this proposition and such is contrary to the law.

This Court is not bound by the findings of a state court and may determine for itself the facts of a case upon which an asserted federal right depends. *Southern Pac. Co. v. State of Arizona*, 325 U.S. 761, at 771 (1945) and the cases cited in *Hoover & Allison Co. v. Evatt*, 324 U.S. 652, at 659 (1945). Whether findings of a state court are supported by substantial evidence in this case is for this Court to determine. *Truax v. Corrigan*, 257 U.S. 312, at 324 (1921). See, e.g., *Washington ex rel. Oregon R. & N. Co. v. Fairchild*, 224 U.S. 510 (1912), wherein this Court reviewed evidence before a state administrative tribunal to determine the existence of public necessity. As was stated by this Court in *Davis v. Wechsler*, 263 U.S. 22, at 24 (1923):

> "If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the [federal] right or to bar the assertion of it even upon local grounds."

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[1] "Brief in Opposition" refers to Brief for Respondent New Mexico Electric Service Company in Opposition. To Petitioners' knowledge, Respondents Continental Oil Company and Public Service Commission of New Mexico have filed no brief or appearance in this matter, as could have been reasonably anticipated due to the position these two parties assumed in proceedings in the state courts of New Mexico. See Petition, footnotes 2 and 3 on page 11 and footnote 5 on page 12.

Compare, *New York Times Company v. Sullivan*, 376 U.S. 254, at 284-5 (1964).

In addition, New Mexico Electric should have drawn attention to the findings of Respondent Commission, rather than to findings made upon judicial review of the Commission's findings. Petitioners respectfully submit that the law of New Mexico is clear that ultimate review is made of the findings of the administrative agency, rather than of the district court. *S. I. C. Finance-Loans of Menaul, Inc. v. Upton*, 75 N.M. 780, 411 P. 2d 755 (1966); *Nationwide Finance Company of Chaves v. State of New Mexico Bank Examiner*, 76 N.M. 191, 413 P. 2d 471 (1966); *El Paso Natural Gas Co. v. Oil Conservation Commission*, 76 N.M. 268, 414 P. 2d 496 (1966). The Commission's findings were adverse to New Mexico Electric and appear in the record on file herein at pages 14-31.

REPLY TO POINT I OF ARGUMENT

Petitioners acknowledge the general rule that presentation of federal questions upon motion for rehearing is untimely. Until the Supreme Court of New Mexico had rendered its opinion (Petition, Appendix A), no one reasonably anticipated, however, that the Supreme Court would take a position completely inconsistent with prior decisions in this area (as shown in Petition, pages 17-30) and would, without an administrative or judicial finding that public convenience and necessity required New Mexico Electric's duplicative service or that Petitioners could not meet Continental's gradually increasing demands, overturn the Commission's order adverse to New Mexico Electric. That the federal issues were thus timely raised under such a circumstance is true even though Petitioners' motions for rehearing were summarily denied without reference to such issues. See the authorities cited in Petition, page 12, footnote 4 and, particularly, *Great Northern Ry Co. v. Sunburst Oil & R. Co.*, 287 U.S. 358, at 367 (1932) (challenge on petition for rehearing in state supreme court to constitutional validity of its decision is timely where grounds of original decision supplied new and unexpected basis for claim of denial of federal right); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*,

281 U.S. 673, at 677-78 (1930) (litigant filing a petition for rehearing before state supreme court asserting denial of due process because of its decision, which petition was denied without opinion, could obtain Federal review); *State of Missouri v. Gehner*, 281 U.S. 313, at 320 (1930) (taxpayer invoking protection of Federal Constitution and statutes at first opportunity on motion for rehearing in state supreme court could have question considered); *Herndon v. State of Georgia*, 295 U.S. 441, at 444 (1935) (question respecting the validity of statute applied by lower court timely raised upon motion for rehearing "if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity"); *Saunders v. Shaw*, 244 U.S. 317 (1917) (claim of denial of federal right entertained even when first made after the state court refused to consider application for rehearing).

REPLY TO POINT II OF ARGUMENT

In its Point II, New Mexico Electric, again without reference to the record and without even therein stating the issue, asserts that the unnamed issue is one of local concern only and that the judgment rests upon an adequate non-federal basis.

While your Petitioners humbly submit that the widespread affect of the decision within New Mexico and upon the 77,328 REA investor-consumers therein and its adverse affect upon REA loans therein in an amount exceeding one hundred million dollars (Petition, page 14, footnote 9) alone warrant this Court's consideration, it is untrue that the importance of the issue is limited to New Mexico. Over half the States of the Union have rural electric cooperative legislation similar to that of New Mexico[2] and at least twelve jurisdictions other than New Mexico have subjected rural electric cooperatives to regulation by a public service commission,[3] a main problem being the protection of cooperatively developed and federally assisted service areas from invasion by private utilities when

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[2] Moses, "Electrification and Telephone Programs," 30 Rocky Mountain Law Review 473, at 474 (1957-58).

[3] Brief for Respondent in Opposition, page 11, footnote 11, *The New Mexico Public Service Commission, et al v. Community Public Service Company*, October Term, 1966, No. 499.

the areas theretofore neglected by the certificated private utilities become dense enough to be financially interesting.[4] Contrary to New Mexico Electric's assertion, the judgment below has application in the East, West, North and South by directly challenging the territorial integrity of present and future REA investment, as well as affecting the tax dollars of United States taxpayers wherever situate invested in federally assisted and cooperatively supplied electricity.

To state that there is adequate non-federal basis for the action below is to beg the question, for the question is whether the action below denied Petitioners federally granted and protected rights. Whether claims are based on a federal right or are merely of local concern is a federal question upon which this Court has the final authority, and the sufficiency of the denial of an asserted federal right is for this Court alone to decide. *Angel v. Bullington*, 330 U.S. 183, at 189 (1947).

REPLY TO POINT III OF ARGUMENT

In its Point III, New Mexico Electric argues that the policies at stake are unimportant. Three substantial policies, affecting not only the Petitioners' constitutional rights, but the cooperative and private sectors of the electric service industry in New Mexico and elsewhere, federal and state public policy and the economic security of the Federal Rural Electrification Administration, are set forth in the Petition, pages 12-17, and need not be re-argued herein; it will sufficient for present purposes to merely examine New Mexico Electric's response to each stated policy.

First, New Mexico Electric dismisses public policy against restraint on competition by stating that the issue involves service to one customer and that the cooperatives are limited from serving the entire public. Only one customer—Continental—is a party, but the entire electric service industry and thousands of customers are also affected.[5] The ability of each

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[4] Moses, Ibid, footnote 2, at 478.

[5] That only small businesses are involved, or even one alone, does not detract from the applicability of policy in favor of competition. See, e.g., *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

of Petitioners to compete is threatened and their market entry is denied. The record further shows that servicing this "particular customer" was essential in order to extend service to and maintain and improve existing service for ranchers and farmers in the rural Maljamar area. (R. 258, 269, 271) The fact that Petitioners' service is limited by enabling legislation as to the members of the public who are not members of the cooperatives can have no possible significance, was not cited by the Supreme Court of New Mexico and, since immaterial, adds nothing whatsoever.

Second, New Mexico Electric asserts that the decision cannot affect the federally sponsored and assisted program of electrification of rural areas and that, anyway, regardless of who serves Continental, "complete new facilities must be constructed to provide the service." As has been seen, the major problem of cooperatives is now the territorial protection of their service areas from invasion and confiscation by the certificated private utility (Petition, page 15, footnote 11) and this very case illustrates the problem. The record, moreover, shows without controvention the importance of the service denied by the decision below to the promotion of electrification in the subject rural area. (R. 258, 269, 271)

Concerning the quoted factual assertion, Petitioners note that the only record reference made by New Mexico Electric is to a judicial finding attacked by Petitioners. Such assertion is true only as to New Mexico Electric. The record affirmatively shows that Continental's eventual requirement would not be reached until some 6 or 7 years following the commencement of the waterflood project (R. 598, 181) and that Petitioners individually could serve Continental's gradually increasing demands by "heavying up" existing facilities and by installing and maintaining additional facilities as the demands outgrew present facilities. (R. 230-33, 248, 366, 374)

Third, New Mexico Electric denies that Petitioners correctly stated the public policy of New Mexico against wasteful duplication, but without hinting at any alternative meaning of § 63-3-1 (B) except to again inject a new contention that Petitioners' aforesaid service limitation should somehow dissipate

the clear legislative statement of public policy. The service limitation has no relevancy to the applicability of the policy against duplicative facilities, and was not cited by the courts below. The statement that such public policy, whatever New Mexico Electric contends it to be, is not applicable in the case at bar, begs the question raised by the Petition herein. The assertion that Petitioners' right to extend their lines was not affected by the decision is ludicrous, in view of the fact that the decision allowed New Mexico Electric to pirate away the customer to whom the lines had and would continue to be extended.

REPLY TO POINT IV OF ARGUMENT

A. As has been stated, New Mexico Electric's assertion that in order for Petitioners to serve Continental completely new facilities would be required, is not supported by the record. It is true, however, that New Mexico Electric had no existing facilities within the area by which it could serve all or any part of Continental's requirements and its closest line was 14¾ miles distant and inadequate to serve the total requirements. (R. 538-39)

1. New Mexico Electric neither denies that Petitioners were first in the area nor the authority contained in Petition, pages 18-19, that Petitioners were thus entitled to protection against unreasonable interference. New Mexico Electric merely asserts that even though Petitioners were operating, it acquired superior rights by virtue of an *area* certificate subsequently granted and the cooperatives should have been careful not to provide service within an area covered by such certificate, though not actually served by New Mexico Electric. Such contention is without merit without stating the corollary that rural residents of the area should be doomed to darkness until New Mexico Electric deemed fit to provide service under its *area* certificate. Additionally, New Mexico Electric can place no reliance upon § 68-7-1.1(B), for that grandfather clause only recognized New Mexico Electric's *area* certificate, if at all, if it were "exercised within the time required under section 68-7-2" and in such event, then "both utilities shall be permitted to continue service." (Petition, page

4) New Mexico Electric's certificate in the Maljamar area had not been exercised within the time required by § 68-7-2 and, in any event, New Mexico Electric had no existing service with which it could "continue."

2. New Mexico Electric's answer to Petitioners' subpoint that its *area* certificate was null and void for non-user consists only of a re-statement of the position assumed by the state courts. Such re-statement avoids the question of whether the position was so arbitrary and unreasonable as to deny Petitioners their constitutional rights.

3. New Mexico Electric's answer to Petitioners' contention that the granting of an *area* certificate is not authorized by law is that the record shows *area* certification has been the consistent practice of the Commission and that such practice of the Commission was approved by the Supreme Court of New Mexico in *Edington v. New Mexico Public Service Commission*, 74 N.M. 647, 397 P. 2d 300 (1964) and not disapproved by *Lea County Electric Co-op v. New Mexico Public Service Commission*, 75 N.M. 191, 402 P. 2d 377 (1965). New Mexico Electric does not, however, cite where the record shows a consistent practice of granting *area* certification, and Petitioners are informed and believe that relatively few *area* certificates have ever been issued as compared to the many non-area certificates issued to various utilities under § 68-7-1. The *Edington* case, if it did involve one of these rare *area* certificates, did not involve or resolve any issue whether *area* certification was permitted by law. The *Lea County* case held just what Petitioners have contended (Petition, page 23), i.e. utilities, including Petitioners, coming under the Public Utility Act by virtue of the 1961 amendment could not obtain *area* certification but only certification limited to *plant, line and system.*

4. In answer to Petitioners' contention that the Commission had the independent power and duty to prevent unreasonable interference, New Mexico Electric answers only that a subsequent holding of the Supreme Court of New Mexico has mooted the argument and, anyway, the attack is against the construction of a state statute by a state court of last re-

sort. *Community Public Service Company v. New Mexico Public Service Commission*, 76 N. M....., 414 P. 2d 675 (1966), cited as mooting the argument, has been stayed by a member of the Supreme Court of New Mexico pursuant to 28 U.S.C., § 2101(f) pending action by this Court in *The New Mexico Public Service Commission, et al v. Community Public Service Company*, October Term, 1966, Docket No. 499. New Mexico Electric's second assertion does not answer the question whether the decision was arbitrary and unreasonable in violation of the 14th Amendment. In addition, in *Coombes v. Getz*, 285 U.S. 434, at 441 (1932), this Court held:

> "The decision of the Supreme Court of a state construing and applying its own Constitution and laws generally is binding upon this court; but that is not so where the contract clause of the Federal Constitution is involved. In that case this court will give careful and respectful consideration and all due weight to the adjudication of the state court, but will determine independently thereof whether there be a contract, the obligation of which is within the protection of the contract clause, and whether that obligation has been impaired; and, likewise, will determine for itself the meaning and application of state constitutional or statutory provisions said to create the contract or by which it is asserted an impairment has been effected. Scott v. McNeal, 154 U.S. 34, 45 S. Ct. 1108, 38 L. Ed. 896; Mobile & Ohio Railroad v. Tennessee, 153 U.S. 486, 492, etc., 14 S. Ct. 968, 38 L. Ed. 793; Stearns v. Minnesota, 179 U.S. 223, 232, 233, 21 S. Ct. 73, 45 L. Ed. 162; Louisiana Ry. & Nav. Co. v. New Orleans, 235 U.S. 164, 170, 35 S. Ct. 62, 59 L. Ed. 175; Huntington v. Attrill, 146 U.S. 657, 684, 13 S. Ct. 224, 36 L. Ed. 1123; N. O. Waterworks v. La. Sugar Co., 125 U.S. 18, 38, 8 S. Ct. 741, 31 L. Ed. 607; Bridge Proprietors v. Hoboken Co., 1 Wall. 116, 144, 17 L. Ed. 571; Jefferson Branch Bank v. Skelly, 1 Black, 436, 443, 17 L. Ed. 173."

See also, *Detroit United Railway v. Michigan*, 242 U.S. 238 (1916); *Appleby v. City of New York*, 271 U.S. 364 (1926);

Irving Trust Co. v. Day, 314 U.S. 556 (1942); *Arkansas Southern R. Co. v. Louisiana & Ark. R. Co.*, 218 U.S. 431 (1910).

B. New Mexico Electric dismisses the impairment of Petitioners' franchise right by arguing that (1) concerning the franchise right under the Rural Electric Cooperative Act, Petitioners must be deemed to have accepted the franchise subject to the ten per cent non-member service limitation and (2) concerning the franchise right under § 68-7-1.1(A), service must be discontinued by virtue of "the nature of the service" rather than due to the decision below. Under either argument, New Mexico Electric admits the existence of franchise rights subject to this Court's protection under Article I, § 10.

For present purposes, Petitioners do not contest that they received their franchise under the New Mexico Rural Electric Cooperative Act subject to the service limitation of § 45-4-3(d). Such service limitation was not mentioned by the Supreme Court of New Mexico in its opinion and has no relevancy whatsoever concerning destruction of Petitioners' enfranchised rights to serve Continental.

As to service under their public convenience certificates, Petitioners, contrary to New Mexico Electric's assertion, could have served Continental upon their existing lines until Continental's gradually increasing load reached the point where additional facilities had to be added and at such point Petitioners could have served the peak demand of Continental at less cost than New Mexico Electric, which required the immediate construction of entirely new facilities to even render one kilowat of service to Continental. What prevents the exercise of such rights is irrefutably the absence of the customer, which was pirated away by New Mexico Electric, which action was upheld by the court below.

REPLY TO POINT V OF ARGUMENT

In answer to Petitioners' Point III that they were denied equal protection of the law, New Mexico Electric asserts that Petitioners and New Mexico Electric were not on equal status by reason of Petitioners' service limitation, Petitioners lost no

right and Petitioners and New Mexico Electric were treated equally.

New Mexico Electric's assertion that the service limitation justified unequal treatment is without foundation in law or in fact.[6] In the opinions below, the New Mexico courts did not base their decisions upon the service limitation, or even mention the same. The New Mexico courts therein assumed that New Mexico Electric and Petitioners performed similar services, were all classified as publlic utilities under the jurisdiction of the Commission and all held certificates of public convenience and necessity granted by the Commission. In the record before this Court no basis for discriminating treatment under the Public Utility Act exists or was assumed.[7]

The assertion that Petitioners lost no right and the parties were treated equally is totally unpersuasive in view of the fact that while Petitioners were denied *area* certification by virtue of *Lea County Electric Coop v. New Mexico Public Serv. Com'n*, 75 N.M. 191, 402 P. 2d 377 (1965), the opinion below upheld New Mexico Electric's *area* certification and based upon such *area* certification, and no administrative or judicial finding of public convenience and necessity, held that the Commission had no jurisdiction to prevent New Mexico Electric's proposed entirely new system from unreasonably interfering with Petitioners' existing plant, line and system serving Continental. By reason thereof, one cannot but conclude that the judgment and opinion of the Supreme Court of New Mexico, and

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[6] There is no evidence in the record that any member of the general public was ever refused service by the Petitioners and § 45-4-3(d) allows service of the general public, or class thereof, to the extent that such member is also a member of the cooperative or is a non-member but within a figure of ten per cent of the number of the cooperative's members.

[7] New Mexico Electric, at pages 13-14 of its Brief in Opposition, states that Petitioners are not required to obtain Commission approval for extensions into adjacent territory. § 68-7-1 provides, however, only for extensions into territory contiguous to that already occupied by it and not receiving similar service from another utility, which would require Commission approval of any extension by Petitioners within a part of New Mexico Electric's certificated area actually served by it.

the franchise sections of the Public Utility Act as interpreted thereby, invidiously discriminate against Petitioners.

CONCLUSION

For the reasons stated in the Petition and hereinabove, it is respectfully submitted that in the exercise of this Court's sound judicial discretion, review on writ of certiorari should be granted.

Respectfully submitted,

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